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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

Nos. 55, 76

BETHLEHEM STEEL COMPANY, *et al.*, *Appellants*,

v.

NEW YORK STATE LABOR RELATIONS BOARD.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

THE ALLEGHENY LUDLUM STEEL CORPORATION, *Appellant*,

v.

WILLIAM J. KELLEY, *et al.*, Constituting the State Labor Relations Board of the State of New York.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF CHAUTAUQUA.

BRIEF FOR APPELLEES KELLEY, *ET AL.*, CONSTITUTING THE NEW YORK STATE LABOR RELATIONS BOARD

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BRIEF FOR APPELLEES

This brief is respectfully submitted in answer to the briefs for the appellants and the brief for the United States as *amicus curiae*.

Opinions Below

In the *Bethlehem* case the opinion of the Supreme Court of the State of New York for the County of Erie (No. 55, R. 38) is not officially reported. It appears in 9 Commerce Clearing House Labor Cases, paragraph 62,611. The unanimous affirmance by the Appellate Division of the Supreme Court of the State of New York, Fourth Department, affirmed without opinion (No. 55, R. 60-1), is reported in 269 App. Div. 805. The unanimous affirmance without opinion by the Court of Appeals of the State of New York (No. 55, R. 62) is reported in 295 N. Y. 601. The order of the Court of Appeals amending its remittitur (No. 55, R. 63) is reported in 295 N. Y. 664.

In the *Allegheny* case the opinion of the Supreme Court of the State of New York for the County of Chautauqua (No. 76, R. 59-63) is reported in 184 N. Y. Misc. 47. The unanimous affirmance without opinion by the Appellate Division of the Supreme Court of the State of New York, Fourth Department (No. 76, R. 65-6), is reported in 269 App. Div. 805. The unanimous affirmance without opinion by the Court of Appeals of the State of New York (No. 76, R. 67-8) is reported in 295 N. Y. 607. The Decision and Direction of Election of the New York State Labor Relations Board in *Matter of Allegheny Ludlum Steel Corp.*, Case No. WE-373, Decision No. 2751, involved in the *Allegheny* case (No. 76, R. 20-38), is reported in 7 N. Y. S. L. R. B. 103.

No decision or direction of election has been issued by the New York State Labor Relations Board in *Matter of Bethlehem Steel Company, et al.*, Case No. WE-379.

Jurisdiction

The appellants have invoked the jurisdiction of this Court under Section 237(a) of the Judicial Code.

Proceedings Below

The course of this litigation before the New York courts and the course of the proceedings before the New York Board are sufficiently stated in the briefs of the appellants and the Solicitor General.

The original date of the filing of the petition with the New York Board in the *Bethlehem* case, however, was August 24, 1944, not October 20, 1944. The latter is the date of the filing of the amended petition (No. 55, R. 20-1, 44-5).

The New York Board has issued no decision in the proceeding involving the appellant *Bethlehem*. That proceeding is still at the hearing stage. Completion of the hearings awaits the outcome of the appellant *Bethlehem's* test of the New York Board's subpoenas at bar.

Statutes Involved

The statutes involved are the New York State Labor Relations Act, herein called the New York Act (New York Laws of 1937, Chapter 443, as amended by New York Laws of 1942, Chapter 518, 30 McKinney's Consolidated Laws of New York, Section 700-716) and the National Labor Relations Act, herein called the National Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*). The pertinent provisions of each statute are attached hereto as Appendix A and Appendix B.

The pertinent provisions of the Rules and Regulations of the National Labor Relations Board are attached as Appendix C hereto.

Statement

In 1944, during the period in which the National Board, pursuant to its decision in *Matter of Maryland Drydock Co.*, 49 N. L. R. B. 733, May 11, 1943, was refusing to process

petitions for investigation of controversies concerning representation of foremen, the appellants' foremen in New York invoked the machinery of the New York Act. The appellants asserted that their New York plants were subject only to the jurisdiction of the National Board.

The New York Board notified the National Board of the filing of the petitions and asked whether the National Board wished to take jurisdiction. The National Board answered that if the petitions had been filed with it, they would have been dismissed without hearing pursuant to its *Maryland Drydock* decision.

The National Board did not request the New York Board to refer these matters to it, or request the New York Board not to act.

A wave of recognition strikes by foremen was then in progress, many of these in war plants.

The appellants contended unsuccessfully below that their foremen are "employers" within the meaning of Section 701, subdivision 2 of the New York Act, and not "employees" within the meaning of Section 701, subdivision 3, and that their foremen could not constitute appropriate bargaining units. Section 701, subdivisions 2 and 3 of the New York Act, so far as material to that issue, are identical with Section 2, subdiviisons 2 and 3 of the National Act.

While the cases at bar were pending undetermined before the Appellate Division of the New York Supreme Court, the National Board, after public hearings, issued its decision in *Matter of Packard Motor Co.*, 61 N. L. R. B. 4, March 26, 1945, overruling the *Maryland Drydock* decision as unsound in law and an obstacle to commerce.

In the *Packard* decision the National Board reverted to the position it had maintained prior to its *Maryland Drydock* decision, and which the New York Board consistently has maintained under the New York Act, namely, that fore-

men may have recourse to the statutory machinery to obtain recognition of a foremen's labor organization as bargaining representative of an appropriate unit of foremen. The *Packard* decision pointed out that from July 1, 1943 through November, 1944, strikes by foremen in key industries had involved 131,000 employees with a loss of 669,156 man-days. Ninety-six per cent., or 642,389, of the man-days were lost as the result of strikes by foremen for recognition (61 N. L. R. B. at 13).

There were no foremen's strikes in appellants' New York plants.

Both Boards have operated under a joint understanding ever since the establishment of the New York Board in 1937. The arrangement continues to this day. Under it the National Board continues to refer to the New York Board cases involving enterprises which affect interstate commerce just as clearly as do those of the appellants. Lists of new cases filed, are exchanged by the Boards at least once a week.

The Issue

The issue which appellants seek to raise, and to which the brief of the United States as *amicus curiae* is addressed, is whether the New York Board lawfully entertained jurisdiction over the controversies concerning representation for purposes of collective bargaining, of the foremen employed in the appellants' New York plants.

That issue raises two questions: First, does the National Labor Relations Act preclude state legislation consistent therewith? Second, does the New York State Labor Relations Act as here applied, conflict with the National Act?

The courts below have disposed of both questions adversely to the appellants.

SUMMARY OF ARGUMENT

Point I

A

The National Act, though paramount, is not exclusive. While that Act is designed to deal with labor controversies which affect commerce, it does not impair New York's right to exercise its police power by legislation consistent with the National Act.

Whether a federal statute enacted pursuant to the "commerce" clause of the Constitution precludes consistent state legislation upon the same subject presents a question of Congressional intent. Congress cannot be held to have intended to bar the exercise of state police powers, even when that may be done, unless its intention to do so is clearly manifested. This canon of construction is particularly applicable where, as here, public safety, health and welfare are concerned.

The National Act shows no intention to bar consistent state Acts. It contains no prohibition, express or implied, against the enactment of state legislation upon the subject of labor relations. Section 10a of the National Act was designed to avoid the then existing diffusion of authority among *federal* agencies. The absence of a saving clause in the National Act is of no significance. At the time of the enactment of the National Act, there was no comparable state statute in existence.

Congress has acquiesced in a long-standing judicial and administrative construction that consistent state Acts lawfully stand together with the National Act.

B

The National Act does not operate in an exclusively national field. A federal statute may deal with a subject of

concern to both the federal government and to the states. But the paramountcy of the federal statute does not make it exclusive.

There is no presumption that Congress intended to occupy the field. The significance of the "field" approach lies, not in the scope of the federal statute, but in the *nature* of the field in which the statute operates, or, at most, in the nature of the statutory subject matter.

The field of labor relations, so far from being inherently national in nature, is, and traditionally has been, local in its nature, although it may also affect inter-state commerce. This is particularly true as to employment relations in manufacturing establishments within the state. The field is appropriate for the exercise of the state police power.

The New York Act, therefore, is in a permissible or concurrent field, and while the National Board has superior jurisdiction over labor controversies within the state and affecting commerce, the New York Board nevertheless has a concurrent right to exercise jurisdiction over such controversies unless and until the National Board assumes or asserts jurisdiction.

Point II

A

The New York Act does not conflict with the National Act, either in terms or as here applied. The two Acts are substantially identical. They have a common purpose.

B

No real question of conflict is involved. The alleged differences between the Acts are differences of words, not of substance.

The appropriate bargaining units here involved are plant units, a type specifically provided for in each Act. Arguments predicated on possible conflict arising out of different applications of the discretionary powers of the two Boards are speculative and may not be taken into consideration.

C

The question of alleged conflict is now moot, for the National Board's decision in *Matter of Maryland Drydock* was overruled by it in *Matter of Packard Motor Car Co.* In any event, the *Maryland Drydock* decision never gave rise to conflict between the two Boards.

D

The New York Act as here applied placed no burden on interstate commerce. On the contrary, it removed a burden therefrom.

Point III

A

Administrative construction reenforces the New York Board's jurisdiction. In 1937, the National and New York Boards adopted, and have since followed, a practical construction of the two Acts based upon concurrent jurisdiction in the New York Board and compatible with no other theory. During the nine years that have elapsed, the New York Board has exercised jurisdiction in matters affecting commerce and over which the National Board could have exercised its superior jurisdiction. In those matters, the action of the New York Board, and the consent or acquiescence of the National Board, were based on the theory of concurrent jurisdiction.

The administrative construction given to the National and New York Acts by those charged with the duty of administering them is entitled to great weight, particularly where the construction has been implemented by a course of conduct over a long period of time.

The fact that the National Board has exercised jurisdiction over rank and file employees at appellant Bethlehem's New York plant is immaterial. Bethlehem's foremen were not involved in those proceedings before the National Board. The action of the New York Board, relating to foremen, did not infringe upon the rank and file units previously established by the National Board.

B

Practical considerations support the New York Board's jurisdiction. Denial to the New York Board of concurrent jurisdiction would require discontinuance of long-standing cooperation, complicate and increase the work of both Boards, decrease their usefulness and create a twilight zone in which both Acts could be evaded with impunity.

The National Board's apprehension that concurrent jurisdiction will result in unions "shopping around" for a "favorable forum" is not supported by past experience. The National Board's asserted inability to act, if it exists, is self-imposed. The National Board, by amendment of its rules, can eliminate "shopping around," for where either the employer or the union is free to invoke the jurisdiction of the paramount national agency, the other cannot effectively select a "favorable forum."

Even without amendment of the National Board's rules, appellants herein could have invoked the jurisdiction of the National Board.

Moreover, the National Board itself could have initiated action in the cases at bar, if it had so desired.

C

The practical construction adopted and followed by the Boards, based on the theory that the New York Board has jurisdiction to act until ousted by the paramount federal power, has worked well and is consonant with established legal principles.

If the National Board desires to alter the present method of clearing cases between the two Boards, that is a matter for discussion between them. It does not constitute ground for nullifying the action of the New York Board in the cases at bar, taken with the acquiescence of the National Board, and in full accordance with the theory of concurrent jurisdiction to which both Boards consistently have adhered.

POINT I

The National Labor Relations Act does not preclude state legislation consistent therewith.

A

The National Act shows no intent to debar consistent state legislation.

The appellants Allegheny and Bethlehem, and the Solicitor General, contend in effect that the National Labor Relations Act precludes any state legislation on the same subject, even if consistent with the National Act, and that therefore the New York Act is unconstitutional insofar as it applied to labor relations in places of business or industry located within New York and affecting interstate commerce. Upon the basis of that contention, they argue that the New York Board has no jurisdiction over the controversies concerning representation of the foremen employed by the appellants at their manufacturing establishments in New York. We respectfully submit that the contention has no merit.

We contend that although the National Act is paramount, it is not exclusive. While that Act is designed to deal with labor controversies which substantially affect commerce, it does not impair New York's right to exercise its police power by legislation consistent with the National Act.

Neither the commerce clause in the Constitution nor the National Act adopted pursuant thereto, contains any words of prohibition against the enactment of state legislation upon the subject of labor relations. Since the New York Act is consistent with the National Act, the New York Board has jurisdiction to act upon a controversy concern-

ing representation arising within the state, even though the controversy affects commerce, so long as the National Board does not "assume or assert" its superior jurisdiction over the controversy. [1]

1. Congressional intent to bar state police power legislation must be clearly manifested.

The contentions of the appellants and of the Solicitor General present a question of Congressional intent as of the time of the enactment of the National Act. Under familiar principles Congress cannot be held to have intended to supersede or suspend the exercise of the police powers of the states, even when that may be done, unless its purpose to do so is clearly manifested (*Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 467; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Kelly* v. *Washington*, 302 U. S. 1, 10-14; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85).

This canon of statutory construction applies even to cases involving the very instrumentalities of interstate transportation. In *Illinois Central R. Co.* v. *Public Utilities Com.*, 245 U. S. 493, this Court stated (p. 510):

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as its purpose to do so is clearly manifested (*Reid* v. *Colorado*, 187 U. S. 137, 148; *Cummings* v. *Chicago*, 188 U. S. 410, 430; *Savage* v. *Jones*, 225 U. S. 501; *Missouri, K. & T. R. Co.* v. *Harris*, 234 U. S. 412, 419)."

That principle is "especially" applicable here where "public safety and health are concerned" (*Maurer* v. *Ham-*

1. See e. g., *Matter of Journal News Corp.*, 7 N. Y. S. L. R. B. 295, 307; *Matter of American Emblem Co.*, 8 N. Y. S. L. R. B. —, Dec. #2923, p. 3.

ilton, 309 U. S. 598, 614). The New York Act guarantees and protects the rights of employees to self-organization and collective bargaining through representatives of their own choosing and provides machinery for the peaceful exercise of those rights. The New York Act expressly provides that it "shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state" (New York Act, Section 700; *Davega-City Radio, Inc.* v. *N. Y. S. L. R. B.*, 281 N. Y. 13, 21).

2. The National Act contains no provision prohibiting consistent state legislation.

The National Act contains no reference to state legislation. The fact is, as the Solicitor General admits (Brief, p. 61), there were no comparable state acts in existence at the time of the enactment of the National Act.

The appellants and the Solicitor General, however, argue that Section 10a of the National Act, by implication, prohibits state legislation. Section 10a provides that the National Board's power to prevent the commission of unfair labor practices affecting commerce "• • • shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

The Solicitor General concedes that the Senate Committee Report (No. 573) expressly states that the purpose of Section 10a was to dispel the confusion resulting from diffusion of *federal* authority. It is then urged that the same considerations are applicable to the adoption of legislation by the several states, and, accordingly, that it is "highly unlikely" that Congress "would have" intended to permit state legislation (Solicitor General's Brief, pp. 58-61).

This line of argument is purely speculative. Congress either did, or did not, have state action in mind when it considered Section 10a. If Congress did not consider state action there could have been no Congressional intent in that regard. On the other hand, if Congress did have the states in mind, the express language of the Senate Committee Report (S. Rep. No. 573, pp. 4-5), [2] limiting the purpose of Section 10a to the prevention of diffusion of *federal* authority, clearly indicates that the section was not intended to apply to, or limit, consistent state action.

The Solicitor General suggests that the word "law" in Section 10a of the National Act "would seem" to include state law. But that argument cannot be reconciled with the admitted fact that Congress was concerned with administration only at the federal level. The word "law" cannot be carved out of context and thereby given a broader meaning than the whole of the section in which it appears. Section 10a moreover must be read in connection with Section 14 of the National Act (S. Rep. No. 573, p. 15; [3] *McCarey* v. *South Dakota*, 250 U. S. 118, 122; *U. S.* v. *Oregon Short Line R. Co.*, 113 F. 2d 212, cert. den. 311 U. S. 679). In Section 14, Congress provided that certain federal laws, insofar as they might conflict with the National Act, were superseded by the National Act. Thus it is clear that when Congress used the word "law" in Section 10a it was referring to federal law and did not contemplate state law. [4]

The plain fact is that neither Section 10a nor Section 14 of the National Act even mention state legislation. As was said in *Wisconsin Employment Relations Board* v. *Rueping Leather Co.*, 228 Wisc. 473, 483:

2. Quoted at p. 59 of the Solicitor General's brief.
3. Quoted at p. 60 of the Solicitor General's brief.
4. *Hill* v. *Florida*, 325 U. S. 538, 542, cited in the opposing briefs, did not turn upon Section 10a of the National Act. It held that the Florida statute as applied, conflicted with Section 7 of the National Act which guarantees the right of employees to bargain through representatives of their own choosing.

> "This section [section 10a of the National Act] purports to deal not with the scope of the Act, but with the powers and jurisdiction of the National Labor Relations Board with respect to its administration. Its purpose is therefore presumably to establish the exclusive character of the Board's powers of administration as contrasted with other federal boards and agencies which might otherwise be thought to have like jurisdiction."

The New York Court of Appeals so held in *Davega-City Radio* v. *New York State Labor Relations Board*, 281 N. Y. 13. The Court said (p. 24):

> "That the National Labor Relations Board is given exclusive jurisdiction under the National act is of significance only in fixing the appropriate agency to enforce the National act, and is not relevant to the question whether a consistent State law may coexist with a National act."

If Congress had intended to preclude enactment of similar state legislation, it would have been easy for it to have used clear language to that effect. Congress could have provided very simply that where the National Act applies, no state legislation may apply. But Congress did not so provide (*R. R. Co.* v. *Grant*, 98 U. S. 398; *Farrington* v. *Tenn.*, 95 U. S. 679, 689).

Speculation as to what Congress might have contemplated is not permissible as a criterion of Congressional intent. As we have pointed out above, this Court has insisted that Congressional intent to preclude the exercise of state police power must be clearly manifested. Indeed, in this very field of labor relations this Court said in *Allen-Bradley Local, etc.* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 749:

> "We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

3. The absence of a saving clause in the National Act is of no significance.

The appellants argue that the fact that the National Act contains no saving clause evidences a Congressional intent to exclude state legislation (*Allegheny Ludlum* Brief, p. 16; *Bethlehem Steel* Brief, p. 16). The argument is without merit. The absence of a saving clause in favor of state legislation has no significance, for as the Solicitor General admits (Brief, pp. 60-1), there was no comparable state legislation in existence at the time of enactment of the National Act.

Moreover, the appellants' argument cannot be reconciled with the requirement that to exclude the exercise of state police power there must be a clear manifestation by Congress of such an intent (pp. 13-14, *supra*). It is not the rule that a Congressional intent not to preclude consistent state legislation must be expressly set forth in a federal statute. On the contrary, the "clear manifestation" rule implies that the absence in a federal statute of any reference to state legislation is, if anything, significant of a Congressional intent *not* to exclude consistent state legislation upon the same subject.

Appellants cite *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 327 U. S. ——, 90 Law Ed. 855, 66 Sup. Ct. 906, as holding that unless federal legislation contains a saving clause, state legislation is precluded. That case does not support appellants' contention. It should be noted (p. 22, *infra*), that the subject of the federal legislation in that case, the Federal Power Act, was the development of water power projects in navigable waters of the United States, a subject peculiarly national in its nature. But, more specifically, the holding in that case was not that the absence of a saving clause precludes state legislation. The holding was merely that the limited provisions of the saving clause in the Federal Power Act, indicated that Con-

gress did not intend to preserve to the states matters not included within the saving clause. Thus, the *First Iowa* case is wholly consistent with our contention that the absence of a saving clause in the National Act did not affect the power of New York to enact legislation consistent with the National Act.

In *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, referred to by the Solicitor General (Brief, p. 66) and the appellant *Allegheny* (Brief, p. 16), the question concerned only the jurisdiction of the National Board over a fraternal benevolent association, which that Board had found to be "engaged in commerce within the meaning of the [National] Act." No question was presented as to whether the National Act precluded consistent state legislation. This Court held only that the National Board had properly assumed jurisdiction.

4. Congress has acquiesced in judicial and administrative construction that consistent state Acts lawfully stand together with the National Act.

Over eight years have elapsed since the Supreme Court of Wisconsin rendered its decision in *Wisconsin Employment Relations Board* v. *Rueping Leather Co.*, 228 Wisc. 473, 279 N. W. 673 (May 17, 1938). Over seven years have elapsed since the New York Court of Appeals rendered its decision in *Davega-City Radio* v. *New York State Labor Relations Board*, 281 N. Y. 13 (July 11, 1939). In each of those cases it was held that the National Act did not preclude consistent state legislation.

During this long period of time Congress has not taken any action to override those decisions. The fact that Congress has not amended the National Act negatives any inference that those decisions were inconsistent with the Congressional intent.

Congress, by failure to act, has similarly acquiesced in the practical construction placed upon the National Act and

the New York Act by the respective Boards hereinafter discussed (Point III, *infra*). Suffice it here to say that for over nine years the two Boards have construed the National Act as affording room for operation of the New York Act even in cases which affect commerce.

B

The National Act does not relate to an exclusively national field.

Labor controversies occurring in places of business or industry within the state are, in their nature, matters of local concern and even when they affect commerce constitute a proper subject for state police power legislation consistent with the National Act.

We have pointed out that the National Act does not manifest any intent, let alone a clear intent, to pre-empt.

The appellants further contend that the National Act covers a field which is national in "scope," and that this excludes the possibility of state legislation in the same field.

The Solicitor General, however, takes a position different from that of the appellants. The Solicitor General contends, in effect, that the National Act pre-empts the field, except that "where the National Board does not exercise its jurisdiction, the state may act" (Brief, p. 77).

There is no merit in appellants' argument that since the National Act is national in "scope," the subject thereof becomes one of exclusive federal concern. Practically all federal legislation is national in "scope," but it does not at all follow that the *subject* of such legislation lies only in the federal domain.

To construe as exclusively pre-emptive all federal statutes enacted pursuant to the "commerce" clause would in

effect abrogate the constitutional limitations upon federal powers, nullify the reservation of state powers and obliterate the fundamental distinction between national and local concerns—a distinction which "is vital to the maintenance of our federal system" (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30).

A federal statute may deal with a subject which is of concern to both the federal government and to the states: to the federal government because of the relationship of the subject to the flow of interstate commerce, and to the states because of the relationship of the subject to local health, safety and welfare. *But the fact that the federal power is paramount does not make it exclusive.*

That, we submit, is the statutory situation here.

The Solicitor General's argument that the National Act is an exclusive pre-emption but that it is such only as to those types of cases which the National Board sees fit to handle, is inherently inconsistent The National Act either does or does not pre-empt the field. It cannot be both exclusive and non-exclusive. Nor can it be partly exclusive and partly non-exclusive. Whether it is, or is not, an exclusive pre-emption i dependent upon the intention of Congress and not that of the National Board. The admission by the Solicitor General that there are many types of labor controversies affecting commerce which the New York Board lawfully has handled, necessarily refutes the argument that the National Act exclusively pre-empts the field. Indeed, the nine-year course of conduct upon the part of the National Board is of necessity based on the assumption that the National Board's jurisdiction, though paramount, is not exclusive (Point III, *infra*).

The Solicitor General further contends that "occupancy of a field" by a federal statute "presumptively" establishes an intention that the subject regulated is to be gov-

erned exclusively by that statute. This theory of "presumptive" preemption finds no support in judicial authority and has no merit whatever. Indeed, the only applicable presumption is directly to the contrary. It is well settled that a presumption of constitutionality exists in favor of state statutes (*Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 465; *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188, 200; *Davis* v. *Department of Labor*, 317 U. S. 249).

Moreover, both the appellants and the Solicitor General misconceive the real point of the "field" approach. Such an approach, if applicable at all, relates, not to the "scope" of the statute, but to the *nature* of the field in which it operates, or, at most, to the *nature* of the subject matter dealt with in the statute (*Cooley* v. *Port Wardens*, 12 How. 299, 319; 13 L. Ed. 996, 1005; *Gilmdn* v. *City of Philadelphia*, 70 U. S. 713; 18 L. Ed. 96, 99; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. Ed. 238, 239-241; *Parker* v. *Brown*, 317 U. S. 341, 362-3).

The significance of the *nature* of the field is clearly shown in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, in which the constitutionality of the Wisconsin Employment Peace Act was involved, and in which this Court distinguished *Hines* v. *Davidowitz*, 312 U. S. 52. The *Hines* case concerned the constitutionality of a state system of registration of aliens. This Court pointed out (315 U. S. at 749) that in the *Hines* case it had been

> "• • • dealing with a problem which had an impact on the general field of foreign relations. • • • In that field any 'concurrent state power that may exist is restricted to the narrowest of limits.' Therefore we were more ready to conclude that a federal act in a field that touched international relations superseded state regulation than we were in those cases where a state was exercising its historic powers over such traditionally local matters as pub-

> lic safety and order and the use of streets and highways. *Maurer* v. *Hamilton, supra,* and cases cited.]"

The opinion continued:

> "Here we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

The patent fact is that none of the classes of judicial decisions upon which the appellants and the Solicitor General rely, namely, decisions relating to international relations, or to development and use of navigable waters, or to the regulation or operation of instrumentalities of interstate transportation, have any application to the cases at bar. Those decisions concern "fields" which obviously are, and consistently have been held to be, inherently federal in nature.

The case of *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 327 U. S. ——, 90 L. Ed. 855, 66 Sup. Ct. 906, dealt with an application for a license relating to the use of navigable waters of the United States, a subject so essentially federal in nature that it is considered to be lifted "out of local controls and into the domain of federal control" (90 L. Ed. at 865). The same principle applies to *Hines* v. *Davidowitz,* 312 U. S. 52 (discussed in the *Allen-Bradley* case, p. 21, *supra*). There the federal legislation dealt with international relations—another field essentially national in its nature.

The same rationale governs the carrier cases cited by the appellants and the solicitor General. [5]

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5. *Gilvary* v. *Cuyahoga Valley R. R. Co.,* 292 U. S. 57, 60; *Napier* v. *Atlantic Coast Line R. R. Co.,* 272 U. S. 605; *Oregon Washington R. & Nav. Co.* v. *Washington,* 270 U. S. 87; *Erie R. Co.* v. *New York,* 233 U. S. 671; *Northern Pacific R. Co.* v. *Washington,* 222 U. S. 370; *Southern R. Co.* v. *Reid,* 222 U. S. 424; *Missouri Pacific R. Co.* v. *Porter,* 273 U. S. 341; *Second Employers' Liability Cases,* 223 U. S. 1; *Charleston etc. R. Co.* v. *Varnville,* 237 U. S. 597; *Gulf etc. R. Co.* v. *Hefley,* 158 U. S. 98; *N. Y. Central etc. R. R. Co.* v. *Board of Chosen Freeholders, etc.,* 227 U. S. 248.

The federal statutes there were applicable to interstate carriers or carriers operating along arteries of commerce, and thus bore directly upon the transportation of persons and goods across state lines—again a subject peculiarly of national concern. Indeed, decisions involving railroad legislation are particularly inapplicable here, for the National Act expressly excludes from its coverage, employers "subject to the Railway Labor Act" (National Act, sec. 2, sub. 2).

Moreover, the carrier cases are in no way analogous since they involved state statutes which generally or specifically conflicted with the federal legislation (See discussion in *Davega-City Radio* v. *N. Y. S. L. R. B.*, 281 N. Y. 13, 23).

The case of *Charleston and Car. Ry. Co.* v. *Varnville*, 237 U. S. 597, stressed in the opposing briefs for the proposition that "• • • coincidence is as ineffective as opposition • • •" (Allegheny, p. 36; Bethlehem, p. 31; Solicitor General, pp. 39, 46-7), was expressly distinguished by this Court in *Chicago & N. W. R. Co.* v. *Whitnack Produce Co.*, 258 U. S. 371. The *Chicago* decision pointed out (258 U. S. at 373) that the *Charleston* case had involved conflict between a federal statute and a state law which was "• • • not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived."

The grounds of distinction between the situation at bar and that presented in the *Charleston* case are even stronger, first, because the situation at bar involves not railroad legislation but labor relations acts, second, because the New York Act is substantially identical with the National Act in policy, purpose and content, and third, because the application of the New York Act to the labor controversies in appellants' New York plants has placed no burden on commerce but on the contrary removed a burden from commerce (Point II, *infra*).

The case of *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, cited by appellants and the Solicitor General, is not in point. The opinion of this Court clearly demonstrates that the basis of the decision was not exclusive pre-emption of a field, but conflict between the federal and state statutes. The federal statute expressly provided that renovated butter imported into a state shall be subject to the laws of the state as though produced therein. The Court said that "this indicates a congressional purpose not to hinder the free exercise of state power *except as it may be inconsistent with federal legislation*" (italics added, 315 U. S. at 161). After discussing the statutes, the Court concluded (315 U. S. at 167): "Coming finally to the query whether the state's claim interferes or conflicts with the purpose or provisions of the federal legislation, we determine that it does." Manifestly, therefore, the *Cloverleaf* case does not support the pre-emption argument urged by appellants and the Solicitor General. The decision in that case, we submit, should be confined to its particular facts involving, as it did, a situation in which the federal and state statutes came into actual conflict with each other.

The essential point here is that the field of labor relations, so far from being exclusively national in nature, is, and traditionally has been, local in its character.

The purpose of the National Act is to safeguard commerce against the industrial strife which arises from the refusal of employers to recognize the rights of employees to self-organization and to bargaining through representatives of their own choosing (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42). But the industrial strife arising from the refusal of employers to recognize the rights of their employees is none the less a matter of substantial local concern.

Although industrial strife within the state may affect interstate commerce, it invariably has a direct and imme-

diate impact upon the local community. A strike or lockout in, or a picket line in front of, a place of business or industry within the state obviously concerns the state as much as the federal government. Indeed, the impact and effect of such a labor controversy within the state would ordinarily be a greater burden to the state than to the federal government. In a situation of that kind it would be but natural and reasonable to invoke an applicable police power statute, for jurisdiction over what is naturally a police power subject is inherent in the local sovereignty of the several states (*U. S.* v. *Butler*, 297 U. S. 1; *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 549, 550, 554; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 308; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245; *Cooley* v. *Board of Port Wardens*, 12 How. 299).

This is not to say that the concern of the states is exclusive. We do not assert, as was argued in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, that the nature of the field precludes action by the Federal Government. Our position simply is that the existence of the federal interest, although paramount, does not preclude New York from also having an interest; in other words, that the existence of the National Act does not preclude New York from legislating consistently therewith.

The nature and extent of local concern with problems arising out of the employment relationship is attested by the fact that ever since the foundation of the Republic, as well as prior thereto, the states have legislated in that field. Generally speaking, that field, except in the maritime and transportation industries, has always been under the control of the states. [6]

The New York Labor Law, most of which was enacted many years ago, deals, among other things, with the em-

6. See e. g. Dodd "From Maximum to Minimum Wages: Six Centuries of Regulation of Employment Contracts," Columbia Law Review, July, 1943, Vol. XLIII, No. 5, p. 643, commencing at heading "Labor Legislation in Colonial America" at p. 660, *et. seq.*

ployment of children and females (Article 4); hours of labor (Article 5); payment of wages (Article 6); general provisions for protection of health and safety of employees (Article 7); public work (Article 8); factories (Article 11); bakeries and manufacture of food products (Article 12); industrial homework (Article 13); mercantile and other establishments (Article 14); Unemployment Insurance (Article 18); minimum wage standards for women and minors (Article 19); Labor Relations Act (Article 20) and Mediation of Labor Disputes (Article 21). Still other branches of labor relations covered by the New York statutes are the Arbitration Law (N. Y. Civil Practice Act, Article 84), the Workmen's Compensation Law, the Employers' Liability Law and Section 876a of the New York Civil Practice Act, governing the issuance of injunctions in labor disputes.

Article I, Section 17 of the New York State Constitution adopted in 1938 provides: "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing." This public policy is expressed in a host of statutes (Civil Rights Law, § 17; N. Y. State War Emergency Act, Laws 1942, Ch. 544, Art. VI, § 69; Gen. Bus. Law, §§ 84, 340 (2), (3); Penal Law, §§ 531, 582; Public Housing Law, § 152; Judiciary Law, § 753a).

The New York Act has been in existence for over nine years and has made a substantial contribution to the cause of reducing industrial strife and unrest (Point III, *infra*).

The long record of state concern with problems arising out of the employer-employee relationship, traditionally considered a proper subject for state legislation even where it might affect commerce, makes it readily apparent why Congress at the time of passage of the National Act "was concerned first with the question whether it had any power at all in the field" (*Wisconsin Employment Relations*

Board v. *Rueping Leather Co.*, 228 Wisc. 473; 279 N. W. 673, 679-80). Indeed, the constitutionality of the National Act remained in serious doubt for a period of approximately two years until the decision of this Court in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

Manifestly, the National Act does not divest the states of the jurisdiction which they have always exercised in the field of labor legislation. *The field is clearly local in its nature although it also may affect interstate commerce.*

The labor controversies in the cases at bar arose in manufacturing plants located within the State of New York —plants which are permanent in character, and in which raw materials brought from other states come to rest and are changed substantially in character, use and value. The controversies arose between the appellants, corporations licensed to do business in New York, and foremen who work in the appellants' New York plants.

Manufacturing is, in its nature, a local activity. It is not itself commerce. It is a step in preparation for commerce. Hence, in a particular case, it may come within the National Act because it "affects commerce" in the sense in which that term is used in the National Act (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1). But even where that is true, it remains in its *nature*, as contrasted with its effect, a local activity.

This Court repeatedly has confirmed that manufacturing is local in character and subject to local legislation. In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, it was said (pp. 303-304, 308):

> "The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. *The latter is a thing apart from the relation*

of employer and employee, which in all producing occupations is purely local in character

* * * * * * *

"*The relation of employer and employee is a local relation.* At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity." (Italics ours.)

In *Utah Power and Light Co.* v. *Pfost*, 286 U. S. 165, 181, it was said that "Commerce succeeds to manufacture, and is not a part of it." In *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 547, this Court quoted with approval its earlier decision in *Industrial Asso.* v. *U. S.*, 268 U. S. 64, 82, to the effect that "manufacturing," like certain other industrial or agricultural activities, is "essentially local." In *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 178, this Court compared mining with manufacturing and said that "mining is not interstate commerce, but *like manufacturing is a local business subject to local regulation and taxation.*" (Italics ours.)

In *Arkadelphia Milling Co.* v. *St. Louis S. W. R. Co.*, 249 U. S. 134, this Court declared (p. 151):

"Upon the facts as stated, it is our opinion that the district court erred in treating the movement of the rough lumber from the woods to the milling point as interstate commerce. It is not merely that there was no continuous movement from the forest to the points without the state, but that when the rough material left the woods it was not intended that it should be transported out of the state, or elsewhere beyond the mill, until it had been subjected to a *manufacturing process that materially changed its character, utility, and value. The raw material came to rest at the mill,* and after the product was manufactured it remained stored there for an indefinite period,—manufacture and storage occupying five months on the average, —for the purpose of finding a market. Where it

would eventually be sold no one knew. And the fact that previous experience indicated that 95 per cent of it must be marketed outside of the state, so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. The question is too well settled by previous decisions to require discussion." (Italics ours.)

The foregoing decisions were cited to this Court in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, in support of the company's contention that manufacturing is exclusively local in nature and that therefore labor controversies arising therein could not affect commerce so as to authorize the exercise of federal power. The Court upheld the constitutionality of the National Act as applied to the company.

As we read the opinion, however, that was done *without disturbing* the principles previously established in the *Carter, Schechter, Oliver, Utah and Arkadelphia* cases; namely, that trade is a thing apart from "the relation of employer and employee, which in all producing occupations is purely local in character" and that manufacturing is a "local" activity subject to local legislation. The decision of this Court in the *Jones & Laughlin* case went no farther than to hold, in substance, that even though manufacturing be local in character, a labor dispute arising in the course of manufacturing may, and in that case did, substantially affect commerce, and therefore came within the reach of the National Act.

We, of course, do not contend that the above-cited cases affect the power of the Federal Government to act in labor controversies affecting interstate commerce. The *Jones & Laughlin* case settled the constitutionality of the National Act and thus confirmed the federal power to act in such controversies.

In the *Jones & Laughlin* case, however, the question presented was the validity of the National Act standing

alone. The New York Act did not become law until July 1, 1937, over two months after the date of the decision in the *Jones & Laughlin* case.

In the cases at bar, the question is whether the New York Act validly stands together with the National Act.

We submit that the principles established in the *Carter, Schechter, Oliver, Utah* and *Arkadelphia Milling* cases give complete support to, and that the *Jones & Laughlin* case is wholly compatible with, our contention that the controversies concerning representation of foremen engaged in manufacturing activities in appellant's New York plants are local in nature, and therefore amenable to the New York Act, even though they also are amenable to the paramount National Act. The particular situation here presented, involving employer-employee relations, which traditionally have been considered a subject of local concern, and manufacturing, which also has long been treated as a matter of local concern, abundantly supports our contention that New York may lawfully exercise jurisdiction over the foremen representation controversies in appellants' New York manufacturing plants, until such time as the National Board assumes or asserts jurisdiction over those controversies because of their effect upon interstate commerce.

At the very least, the subject dealt with in the National Act is of local, as well as national, concern and hence an appropriate subject for state police power legislation consistent with the National Act. The situation is analogous to that presented in *Parker* v. *Brown*, 317 U. S. 341, in which the Court said (p. 367) that the adoption of legislative measures to prevent the demoralization of industry (in that instance, an agricultural industry) was

> "* * * a matter of state as well as national concern and, in the absence of inconsistent Congressional

action, is a problem whose solution is peculiarly within the province of the state."

The opposing briefs stress the statement of this Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 123, that the National Act is "federal legislation, administered by a national agency, intended to solve a national problem on a national scale."

That statement, however, should be read in the light of the issue that was before the Court, and interpreted accordingly. The *Hearst* case did not involve any state statute or any issue of pre-emption.

The issue presented in the *Hearst* case was as to the propriety of a finding by the National Board, that certain newsboys were "employees" within the meaning of the National Act. The publishers there contended that the issue should have been resolved under the common law of California, where the newsboys worked; that under California common law the newsboys were independent contractors; and that therefore they were not employees within the meaning of the National Act (322 U. S. at 120).

This Court discussed the varying lines of demarcation used by the courts of the different states in distinguishing between employees and independent contractors. The opinion stated that if the publishers' contention were accepted, the meaning of the term "employee" as used in the National Act would become dependent on either "local state law" or "a sort of pervading general essence distilled from state law," and that under either alternative the meaning of the term "employee" in the National Act would vary with accidents of geographical location (322 U. S. at 122). The Court held that such a result could not be permitted.

It was in *that* connection that this Court stated the National Act "is federal legislation administered by a

national agency, intended to solve a national problem on a national scale" (322 U. S. 123).

Considered in connection with the issue actually before this Court in the *Hearst* case, it is clear that the above-quoted language was in no sense a holding that the National Act is an exclusive pre-emption for no such question was involved. The holding was only that the term "employee" as used in the National Act, is not limited by state law.

Clearly, then, the *Hearst* case does not support the appellants or the Solicitor General. On the contrary, that decision is entirely consistent with our position on these appeals. A holding that the meaning of a term used in a federal statute may not be limited by state law, is perfectly consistent with the proposition that the New York Act may co-exist with the National Act.

There is but one decision of this Court which discusses the National Act in relation to the New York Act namely, *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197. Although the factual situation there presented did not involve actual application of the New York Act, that case clearly supports our position in principle.

The company, apart from its argument that it was engaged solely in intra-state business, contended that even if its activities did affect interstate commerce, the enactment of the New York Act made application of the National Act unnecessary. This Court, rejecting that contention, said (305 U. S. at p. 224):

> "In the instant case, not only was this proceeding instituted before the New York Labor Relations Act became effective, but so far as appears, no proceedings have been taken under it in relation to the unfair labor practices here alleged. For the present purpose, it is sufficient to say that there has been no exertion of state authority which can be taken to remove the need for the exertion of federal authority to protect interstate and foreign commerce."

The quoted matter is implicit with a holding that the National Act does not exclusively occupy the field, for it is based upon the premise that the National Act and the New York Act may co-exist and stand together.

The holding is entirely consistent with our position that although the National Act is paramount, the New York Act is also valid and applicable to labor controversies occurring in places of business or industry within the state, even though such controversies may affect interstate commerce.

To paraphrase the above quotation from the *Consolidated Edison* case, it is sufficient that in the instant cases there has been no exertion of national authority which can be taken to remove the need for the exertion of state authority in order to protect public health, safety and welfare within New York. This clearly follows from the fact (Point III, *infra*) that the National Board did not assume or assert jurisdiction or object to the New York Board entertaining jurisdiction over the labor controversies concerning the representation of foremen in the appellants' New York plants.

The decision of this Court in *Allen-Bradley Local etc.* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, although not directly in point, indicates clearly that the National Act does not exclusively occupy the field. While the portion of the Wisconsin Act there under consideration dealt with unfair labor practices committed by employees, rather than employers, the decision nevertheless is significant upon the question of pre-emption, first, because this Court there reaffirmed the principle that "an intention of Congress to exclude states from exercising their police power must be clearly manifested" (p. 749), second, because the Court did not state or even suggest that the National Act precluded state legislation consistent therewith, although that contention was made, and third, because the

Court held that the National Act and the Wisconsin Act as applied could "consistently stand together." [7]

Apart from the decisions which give rise to these appeals, the only New York Court of Appeals decision, involving the question of pre-emption, is *Davega-City Radio, Inc.* v. *New York State Labor Relations Board*, 281 N. Y. 13.

There the company sought to vacate an order of the New York Board. The company contended that its activities affected interstate commerce; that the National Act is an exclusive pre-emption; and that the New York Board was therefore without jurisdiction. The Court assumed, but did not determine, that the company's activities sufficiently affected commerce so as to make it amenable to the jurisdiction of the National Board (281 N. Y. at 20).

The Court rejected the company's contention that the National Act is an exclusive pre-emption, saying (281 N. Y. at 22):

> "From a study of authorities it does not appear that the National Labor Relations Act *ipso facto* precludes the State legislation applicable to the same situations." [8]

The opinion, after discussing various judicial authorities, continued (281 N. Y. at 24):

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7. The Wisconsin Supreme Court in *International Union, etc.* v. *Wisconsin Employment Relations Bd.*, 245 Wis. 417; 14 N. W. (2) 872, said that the decision of this Court in the *Allen-Bradley* case:

> "* * * determines that the State agency may take jurisdiction of proceedings to enforce the State act unless there is conflict between the two acts. The thing that determines jurisdiction of the State Board is conflict between the two acts, not the mere fact that the Congress has passed a Federal act affecting interstate commerce."

8. The case most stressed in the opinion, (281 N. Y. 13, 21, 22) as militating against the pre-emption theory is *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188. In the *Dickson* case this Court held that federal regulation of trading in grain futures, under the Federal Grain Futures Act, did not imply a prohibition of more rigorous state legislation, the Missouri bucket shop law, and that therefore the federal statute did not supersede the state statute.

> "We reach the conclusion, therefore, that the State Labor Relations Board may enforce the State act at least until such time as it is ousted by the exercise by the National Labor Relations Board of its jurisdiction under the National Act." [9]

The Court further stated that there was no need to consider "at what point the State Board would be displaced," for the record showed that the National Board had advised the New York Board that the National Board would not assume jurisdiction. The Court concluded that (281 N. Y. at 24):

> "It is sufficient that in the present case the National Board has not acted."

The same situation obtains in the cases at bar (Allegheny R. pp. 45-6; Bethlehem R. pp. 56-7). The National Board did not assume or assert jurisdiction over the controversies concerning the representation of the foremen in the appellants' New York plants. The National Board at no time acted to displace the New York Board and did not even suggest that it had any objection to the New York Board entertaining jurisdiction (Point III, *infra*). The New York Board therefore properly exercised jurisdiction.

Moreover, as we shall show in Point III, *infra*, the non-pre-emptive character of the National Act is further reenforced by the administrative construction and procedure to which both the National and New York Boards have adhered for over nine years.

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9. The Wisconsin and Pennsylvania Courts also have held that the National Act does not bar state legislation consistent therewith (*Wisconsin Employment Relations Bd.* v. *Rueping*, 228 Wisc. 473; 279 N. W. 673, 679-80, cited in the *Davega* opinion, 281 N. Y. at page 25; *Christoffel* v. *Wisconsin Employment Relations Bd.*, 243 Wisc. 332, cert. den., 320 U. S. 776; *International Union, etc.* v. *Wisconsin Employment Relations Bd.*, 245 Wisc. 417; 14 N. W. (2) 872; *Allen-Bradley Local, etc.* v. *Wisconsin Employment Relations Bd.*, 237 Wisc. 146, aff'd 315 U. S. 749; *Wisconsin Bd.* v. *Hall Garage Corp.*, Wisc. Circuit Court, decided Sept. 7, 1946, 18 Labor Relations Reference Manual 2419; *In re York Telephone & Telegraph Company's Employees*, Pennsylvania Court of Common Pleas, decided Sept. 21, 1945, 17 Labor Relations Reporter 175; *Matter of Equitable Gas Co.*, 51 D & C (Pa.) 659).

Finally, even if it were assumed, that the National Act might be susceptible of a possible *inference* of prohibition against the exercise of state police power upon the same subject, this still would not affect the validity of the New York Act. A mere inferable intent to prohibit state legislation is ineffective *unless such legislation be directly inconsistent with the National Act.* If it is reasonably possible to reconcile a state act with the National Act, the two acts co-exist and stand together (*Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156; *Kelly* v. *Washington*, 302 U. S. 1, 10-14; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 751; *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57, 61; *Savage* v. *Jones*, 225 U. S. 501, 533; *Alabama State Fed. of Labor* v. *McAdory*, 325 U. S. 450, 467).

In the *Cloverleaf* case (*supra*) this Court said (315 U. S. at 156):

> "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

And in *Kelly* v. *Washington* (*supra*) it was said (302 U. S. at 10):

> "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts 'cannot be reconciled or consistently stand together.'"

In this Point, we have shown that the National Act does not manifest any intention to preclude consistent state legislation in the same field; that the field in which the National Act operates is not inherently national in nature; that, on the contrary, the field of labor relations is, and

traditionally has been, local in character, and therefore constitutes a proper subject for state legislation consistent with the National Act.

We shall now show (Point II *infra*), that the New York Act does not conflict with the National Act, either in terms, or as here applied.

POINT II

The New York Act does not conflict with the National Act, either in terms or as here applied.

In Point I we have demonstrated that the contention of "exclusive preemption" has no merit since the National Act neither expressly nor impliedly prohibits consistent state legislation upon the same subject.

Equally untenable is the contention that the New York Act conflicts with the National Act in terms or as here applied.

Far from being in conflict, the two Acts are substantially identical. The New York Act, therefore, is legally applicable to any labor controversy occurring within New York, even one affecting commerce, so long as the National Board does not assume or assert its paramount jurisdiction over the same controversy.

A

The New York Act is "the State's equivalent" of the National Act.

The New York Act is the State's counterpart of the National Act. The two Acts harmonize and consist with each other in all substantial respects.

Each Act guarantees the right of employees to "self-organization, to form, join, or assist labor organizations, to

bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." (National Act, Section 7; New York Act, Section 703). In 1938 this guarantee was embodied in Article I, Section 17 of the New York State Constitution (p. 26, *supra*).

In *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, this Court, referring to the New York Act, said (p. 223):

> "The state act, with added details, follows closely the national act."

The *Consolidated Edison* case was followed by the New York Court of Appeals in *Davega-City Radio, Inc.* v. *New York State Labor Relations Board*, 281 N. Y. 13. The New York Court rejected the "conflict" contention, saying (p. 22):

> "The two statutes are not only alike in their provisions but are almost identical in their language. It has been observed that the New York act is the State's equivalent of the National Act (*Consolidated Edison Co.* v. *National Labor Relations Board, supra*, at pp. 222, 223). If the employer were to obey the mandate of the State rather than that of the National act the result would be precisely the same."

The Court further stated (281 N. Y. at 22):

> "Similarly the New York State Labor Relations Act is in no way inconsistent with the provisions of the National Labor Relations Act, and the New York law does not legalize any transaction which the National act has denounced."

The determination that both Acts "are not only alike in their provisions but are almost identical in their language" was reiterated and approved by the New York

Court of Appeals in *New York State Labor Relations Board* v. *Holland Laundry, Inc.*, 294 N. Y. 480, 492-3.

A presumption of constitutionality exists in favor of a state statute, and the statute cannot be condemned as in conflict with federal legislation unless conflict is clearly shown (*Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188; *Davis* v. *Dept. of Labor of Washington*, 317 U. S. 249). The conflict, if any, must be "so direct and positive that the two acts cannot be reconciled or consistently stand together." (*Kelly* v. *Washington*, 302 U. S. 1, 10; *Savage* v. *Jones*, 225 U. S. 501, 533; *Allen-Bradley Local, etc.* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 751).

The New York Act and the National Act here "consistently stand together," for they are substantially the same. Indeed, the New York Act is consistent with the National Act in the *most direct and satisfactory sense*, since it is practically identical with the the National Act.

B

No real question of conflict is involved.

It is contended in the opposing briefs that the National Act and the New York Act, so far as representation proceedings are concerned, conflict (1) because the two acts allegedly provide different standards or criteria for the determination of appropriate bargaining units, (2) because allegedly each board serves the interest of the sovereignty which created it, and (3) because the discretion vested in the respective boards permits possible conflict.

The contention has no merit.

1. Types of Appropriate Bargaining Units.

The appellants and the Solicitor General assert that the two Acts conflict in that they allegedly set up different

standards for determining appropriate units for purposes of collective bargaining. Both acts mention employer units, craft units and plant units as appropriate forms of unit (National Act, §9(b); New York Act, §705(2)). The New York Act, in Section 705(2), also mentions multiple employer units, whereas the National Act does not. In addition, the New York Act (sec. 705, sub. 2) contains a provision, not found in the National Act, that "where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining." Upon the basis of these alleged differences, it is contended that the two Acts conflict.

These alleged differences are not here involved. They are wholly immaterial (*Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461).

Each of the cases at bar involves a *plant* unit, a type of unit specifically provided for in *both* the National Act (sec. 9, subd. b) and the New York Act (sec. 705, subd. 2).

Neither case involves a multiple employer unit, a craft unit, a single employee unit, or a multiple state unit. In each of the representation proceedings before the New York Board, the foremen's union petitioned for a plant unit. In neither of the representation proceedings did the appellants contend that a multiple employer unit, a craft unit, a single employee unit or a multiple state unit was appropriate. In the *Allegheny* case the New York Board found a *plant* unit. And no unit determination has yet been made by the New York Board in the representation proceeding involving appellant *Bethlehem*. That proceeding is still at the hearing stage pending compliance by *Bethlehem* with the subpoenas at bar.

Moreover, the alleged differences between Section 9(b) of the National Act and Section 705 (2) of the New York Act are differences merely in words, not in substance.

Under each Act, the appropriate unit is to be one which will "effectuate the policies" of the Act. Both Acts have a common purpose, namely, to minimize industrial strife, in the public interest.

The difference in wording between Section 9(h) of the National Act and Section 705 (2) of the New York Act creates no conflict. Although the National Board's decisions as to multiple employer units do not depend upon an express statutory provision, such as is contained in the New York Act, those decisions are in substantial accord with the decisions of the New York Board. There are many cases in which the National Board has found that type of appropriate bargaining unit (*Matter of Rayonier Inc., Grays Harbor Division*, 52 N. L. R. B. 1269; *Matter of George F. Carleton & Co., Inc.*, 54 N. L. R. B. 222; N. L. R. B. Ninth Annual Report, p. 33 [10]). Indeed, the National Board had found such units; and such units had been sustained by the Federal courts, before the New York Act was amended in 1942 so as to make specific mention of multiple employer units (*National Labor Relations Board* v. *Lund*, 103 F. (2d) 815, 819, decided May 10, 1939).

Again, while the National Act does not contain the proviso found in Section 705 (2) of the New York Act, namely, that where the majority of employees in a particular craft so decide, the Board shall designate the craft unit as appropriate, nonetheless the National Board frequently follows a similar procedure, i. e., direction of a preliminary election in which the craft group may vote as to whether they wish to bargain separately as a craft, or be merged with other groups. [11]

10. "Since a group of employers in certain circumstances may constitute a single 'employer' within the purview of the Act, some or all the employees of the group may be deemed an appropriate unit."

11. The National Board, in its Ninth Annual Report, said (p. 34):

"Where the considerations favoring a craft unit and those favoring a more comprehensive unit are of substantially equal weight, the Board generally directs a self-determination election in order to ascertain the desires of the employees with respect to the union by which they wish to be represented, and consequently the type of unit in which they prefer to bargain."

Clearly, therefore, the alleged differences between Section 9(b) of the National Act and Section 705 (2) of the New York Act, even if applicable to the cases at bar, do not create any conflict in the Acts themselves or in their application by the respective Boards.

2. Different Sovereignties.

The contention that the National Board and the New York Board serve the interest of different sovereignties, and that this will tend to create conflict, is plainly erroneous and contrary to constitutional principles protecting the states' historic police power.

That the National Board derives its authority from a federal statute, while the New York Board obtains its authority from a state statute, neither constitutes, nor leads to, conflict between the two Acts. It is true that the National Act is an exercise of the federal government's power to safeguard inter-state commerce from obstruction, whereas the New York Act is an exercise of the state's police power "for the protection of the public welfare, prosperity, health and peace" (N. Y. Act, Sec. 700). That the respective sovereignties draw on different sources for their respective powers, however, does not alter the fact that both Acts are aimed at the *same mischief* and have a *common purpose*. The National Act seeks to minimize industrial strife because it "has the effect of burdening or obstructing commerce"; the New York Act, because it is "inimical to the public safety and welfare and frequently endanger[s] the public health." But both statutes have a common objective.

That both statutes have a common purpose has been explicitly recognized by the New York Court of Appeals in *Davega-City Radio, Inc.* v. *New York State Labor Relations Board*, 281 N. Y. 13, and in *New York State Labor Relations Board* v. *Holland Laundry, Inc. et al.*, 294 N. Y. 480, 492-3, where it was said:

> "Opinions of the Federal court construing the National Labor Relations Act apply with equal force to the State Labor Relations Act, though they are of course not legally binding in that field."

Accordingly, the fact that the Boards serve different sovereignties neither constitutes, nor tends to cause, conflict.

3. Discretionary Powers.

Finally, it is contended that the discretion vested in the respective Boards to determine appropriate bargaining units may result in conflict between the National and the New York Acts. That contention is without merit.

Conflict can only result, if at all, from the *exercise* of discretion in application to a *particular labor controversy*, and then only where there is *actual conflict between two decisions* resulting from the exercise of such discretion.

The discretion exercised by the New York Board in the instant labor controversies, obviously raised no conflict between the two Boards. The National Board did not assume or assert jurisdiction over these labor controversies (Allegheny, Rec. pp. 45-6; Bethlehem, Rec. pp. 56-7).

Further the "conflict" argument is couched in terms of what "might" or "could" or "would" or "may" result from the exercise of the discretionary powers vested in the two Boards. It is predicated, not upon any present factual situation, but upon the mere future possibility of conflicting applications of the two Acts by the respective Boards.

Such conjectural or hypothetical applications should not be taken into consideration. [12]

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12. Concern lest the New York Board certify a "company union" in the guise of an independent union (Solicitor General's brief p. 53), is not only conjectural, but overlooks the explicit provision of the New York Act that such a union "shall not be listed on the ballots, certified or otherwise recognized as eligible to be the representative of employees under this article" (New York Act, Section 705, subdivision 6).

It is not even suggested by the appellants or the Solicitor General that the Foreman's Association of America, which the New York Board certified in the *Allegheny* case, is a company union. That very union was certified by the National Board in the *Packard* case.

The jurisdiction of this Court may not be invoked upon academic or speculative matters. The Court has emphasized that it deals with cases upon the basis of the actual facts presented, and not upon non-existent or assumed circumstances. As was said in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461):

> "It has long been its [this Court's] considered practice not to decide abstract, hypothetical or contingent questions, * * * or to decide any constitutional question in advance of the necessity for its decision, * * * or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, * * * or to decide any constitutional question except with reference to the particular facts to which it is to be applied." [13]

Moreover, there never has been any real conflict.

C

The *Maryland Drydock* decision, now moot, never gave rise to conflict.

Even apart from the academic or hypothetical nature of the "conflict" contention, there is clearly no legal basis for such a contention.

The alleged conflict between the New York Board's decision in the *Allegheny* case at bar, and the decision of the National Board in *Matter of Maryland Drydock Company*, 49 N. L. R. B. 733, even assuming that it ever existed, concededly *ended* when the National Board overruled its *Maryland Drydock* decision in *Matter of Packard Motor Car Co.* (61 N. L. R. B. 4; 64 N. L. R. B. 1212, enforced August 12, 1946, —— F. (2) ——, not yet reported, Circuit

13. See also: *Bandini Petroleum Co.* v. *Superior Ct.*, 284 U. S. 8, 76 L. Ed. 136, 145; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 81 L. Ed. 953, 960; *Hicklin* v. *Coney*, 290 U. S. 169, 78 L. Ed. 247, 250; *Gt. Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 81 L. Ed. 1193, 1203; *U. S.* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243; *Watson* v. *Buck*, 313 U. S. 387, 85 L. Ed. 1416.

Court of Appeals, 6th Circuit, 18 L. R. R. M. 2432; petition for certiorari filed October 30, 1946, 19 L. R. R. 12).

In the *Maryland Drydock* case, the National Board, Chairman Millis dissenting, had dismissed a petition for investigation of a controversy concerning the representation of foremen, holding that units of foremen were not appropriate for bargaining, except in particular industries where there had been a prior history of bargaining by foremen. The National Board's decision there overruled a long line of its prior decisions which had held units of supervisory employees to be appropriate.

In the *Packard* case the National Board expressly overruled the *Maryland Drydock* decision, and held a unit of foremen to be appropriate.

The National Board in the *Packard* case emphasized the same criteria and adopted the same rationale which the New York Board consistently has applied. The union involved in the *Packard* case is the same union as in the instances at bar, namely, the Foremen's Association of America. The unit found appropriate in the *Packard* case is the same type as that which the New York Board previously had found appropriate in the *Allegheny* case at bar. [14]

The National Board's Decision and Direction of Election in the *Packard* case was issued while the cases at bar

14. In the *Packard* case the National Board found (61 N. L. R. B. at 26):

"* * * all general foremen, foremen, assistant foremen, and special assignment men employed by the Company at its plants in Detroit, Michigan, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act."

In the *Allegheny* case the New York Board found (No. 76, R., pp. 37-8):

"The foremen, shift foremen, general foremen and general shift foremen (excluding the general manager, assistant general manager, production manager, manager, superintendents, shift superintendents, assistant superintendents and supervisors) employed by Allegheny Ludlum Steel Corporation at its Dunkirk, N. Y., plant, constitute a unit appropriate for the purposes of collective bargaining with the meaning of Section 705, subdivision 2, of the Act."

were pending undetermined before the Appellate Division of the New York Supreme Court. That decision was specifically called to the attention of the Appellate Division and, later, the New York Court of Appeals.

Since the New York appellate courts were required to consider appellants' assertion of "conflict" in the light of the situation as it actually existed *after* the *Packard* decision, it is clear that the matter reviewed by the New York appellate courts involved no conflict at all (*Graybar Elec. Co.* v. *New Amsterdam Casualty Co.*, 292 N. Y. 246, 250; *Hill Packing Co.* v. *City of N. Y.*, 295 N. Y. 527, 538.

The fact is, however, that there was no "conflict" *even before* the National Board overruled its *Maryland Drydock* decision.

The *Maryland Drydock* decision did *not* prohibit collective bargaining by foremen outside the framework of the National Act, but merely declined to make the National Board's election and certification machinery available to them. In *Matter of Soss Mfg. Co.*, 56 N. L. R. B. 348, [15] the National Board held that the discharge of a foreman for union activity constituted a violation of the National Act and that its prior decision in the *Maryland Drydock* case was *not* to be taken to mean that it was illegal for foremen to organize and bargain through representatives of their own choosing. The National Board, in the *Soss* case, said (p. 352):

> "Moreover, our opinion in that case [the *Maryland Drydock* case] did not illegalize collective bargaining outside the framework of the [National] Act for the supervisors' organizations."

It is therefore clear that even prior to the National Board's decision in the *Packard* case, the New York Board's certification in the *Allegheny* case—assuming it

15. Decided May 8, 1944, before the New York Board's decision in the *Allegheny* case (May 24, 1944).

was an order or direction, which it was not, [16]—did not direct or prohibit any action which was prohibited or directed by the National Act or by the National Board. *The action of the New York Board did not deprive the appellants of any right under the National Act.* Neither the National Act nor, for that matter, the *Maryland Drydock* decision, created any right in the appellants.

In the definitive or real sense of the term, therefore, there was no conflict between the *Maryland Drydock* case and the decision of the New York Board in the *Allegheny* case. [17]

It is argued by the Solicitor General (brief, p. 36) that the National Board's refusal to entertain foremen's petitions during the brief life of the *Maryland Drydock* decision was the enforcement of a policy that employers "not be required" to bargain with foremen. It is asserted that the National Board intended to differentiate between voluntary and "required" recognition or bargaining on the theory that voluntary recognition or bargaining is less likely to result in interference by supervisors with the rights of rank and file employees. In the *Soss* case (discussed at p. 46, *supra*) the National Board said (56 N. L. R. B. at 352) that the *Maryland Drydock* decision "did not illegalize collective bargaining outside the framework of the [National] Act, for the supervisors' organizations." Although the National Board was aware of the New York Board's consistent recognition of foremen, the National Board gave no indication that it intended to preclude "required" bargaining *under state statutes.* [18]

16. *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 453, 459; *A. F. of L.* v. *National Labor Relations Board*, 308 U. S. 401; *National Labor Relations Board* v. *I. B. E. W.*, 308 U. S. 413; *Matter of Wallach's, Inc.* v. *Boland* (N. Y. S. L. R. B.), 253 App. Div. 371, aff'd 277 N. Y. 345; *Great Atlantic & Pacific Tea Co.*, v. *Roland* (N. Y. S. L. R. B.), 176 Misc. 258, aff'd 261 App. Div. 900).

17. Hearings in the *Bethlehem* case have not been concluded and no decision has been rendered by the New York Board in that case.

18. The basis advanced by the Solicitor General (Brief, p. 35) for the suggested differentiation between voluntary and required recognition or bargaining is difficult to comprehend. In situations in which the employer voluntarily deals with a supervisors' organization, there is at least as much likelihood of interference with the rights of rank and file employees.

The Solicitor General also contends (brief, p. 32) that the refusal of the National Board to entertain foremen's petitions was an "affirmative" assertion of jurisdiction, comparable to the dismissal of a petition seeking a particular type of bargaining unit which the National Board, after hearing, finds not to be appropriate. There is, however, a vital distinction between the example offered by the Solicitor General and the type of action taken by the National Board under the *Maryland Drydock* decision.

In the Solicitor General's example, the petition is dismissed *after* hearing. Moreover, dismissal of the petition follows only where the petitioning union does not desire to proceed except on the basis of the bargaining unit which it asserted to be appropriate. Where the petitioning union so desires, the National Board directs an election in whatever unit it finds to be appropriate, even though that unit may differ from the unit originally sought (*Matter of Vaughan Motor Co.*, 54 NLRB 1351, 1357).

Under the former *Maryland Drydock* decision, however, the National Board refused to entertain foremen's petitions or to hold hearings thereon, *regardless* of the type of bargaining unit sought. Thus, the position of the National Board under the *Maryland Drydock* decision, clearly was not an affirmative assertion of jurisdiction. It was rather a declination to act, that is, a refusal to entertain jurisdiction. [19] Even assuming, for purposes of discussion, that the National Board might, in its discretion, withhold the exercise of its power to compel collective bargaining, it does not follow that the National Board had authority to prohibit collective bargaining outside the framework of the National Act. To argue, as does the Solicitor General, that the National Board, by a mere declaration of policy, may bind even those who have not

19. In the *Packard* decision the National Board characterized the *Maryland Drydock* holding as "a policy of negation which contributes nothing to a constructive solution" (61 N. L. R. B. at 20); see also the dissenting opinion in *Matter of Maryland Drydock*, 49 N. L. R. B. at 749.

invoked its jurisdiction, is to transform what Congress set up as a quasi-judicial body (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 267), into a quasi-legislative body. [20]

The National Board itself, however, has concluded that it is *without power* to refuse to entertain foremen's petitions or to refuse to place foremen in any bargaining unit whatsoever. The Solicitor General's brief states (p. 30n) that in the *Jones & Laughlin* decision, 66 N. L. R. B. 386, which followed the *Packard* decision, the National Board

> "concluded that in view of the statutory grant of 'full freedom' in the selection of representatives to all employees it [the National Board] was *powerless* to deny to supervisors, as to other employees, the right to be represented by any bona fide labor organization of their choice whether affiliated or unaffiliated." (Italics ours.)

In the *Jones & Laughlin* case, the majority of the National Board had stated [see 17 L. R. R. 972]:

> "The Board has already found that these foremen are 'employees' within the meaning of the Act. We think that this is largely dispositive of this case. The Act contains no specific language empowering the Board to disqualify a freely chosen, legitimate labor organization, not company-dominated, as the collective bargaining representative of persons already found to be 'employees' within the meaning of the Act.
>
> "It is argued, in effect, however, that the duty to define the appropriate unit conferred by Section 9 (b) carries with it a power to limit the em-

20. Cf. the dissenting opinion in *Matter of Maryland Drydock*, 49 N. L. R. B. at 743:

> "Manifestly to engraft upon the Act an amendment which denies to a substantial segment of employees as a class the protection vouchsafed therein to all 'employees' is not within the permissible bounds of administrative discretion. It is administrative legislation."

> ployees' choice of a bargaining representative. 'A reading of the section does not support this view. Section 9 (b) is concerned with the question of how employees are to be grouped and not with the question of who is to represent them. The Board is entrusted with the task of deciding whether the 'employer unit, craft unit, plant unit, or subdivision thereof,' is the appropriate unit calculated 'to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act.' This is language of classification and not of exclusion. It authorizes the Board to select between alternatives as to which type of unit will best 'effectuate the policies of the Act'; *it gives us no license to hold that some persons who are 'employees' belong in no unit whatsoever.* Once the Board determines that certain employees are properly grouped, it has discharged its function under this section. As the statute is now written, *we find no authority to step beyond this point* and, because of some concern as to what might be best for industry or even for employees, declare that certain employees may not express their uninhibited choice because the petitioner happens to be an affiliate of the labor organization which represents a company's rank and file employees." (Italics ours.) [21]

Clearly, therefore, the National Board not only has overruled the *Maryland Drydock* decision, but has expressly recognized that it had been *without power or authority* to enunciate any such policy. Under these circumstances, it cannot be successfully maintained that the New York Board's action was invalid.

Thus the alleged conflict with the National Board's policy is of no consequence, for the National Board has repudiated that policy as beyond its authority and as disruptive of interstate commerce as well.

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21. To the same effect, see *L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298.

D

Th New York Act as applied placed no burden on interstate commerce.

The arguments of the appellants and the Solicitor General proceed upon the assumption that the New York Board's action in *the instant cases* imposed a burden on interstate commerce. That assumption is unfounded and, indeed, is completely refuted by the facts.

Appellants' contention that the action of the New York Board has burdened interstate commerce originally was based upon the alleged conflict between the *Maryland Drydock* decision and the action of the New York Board in the cases at bar. Wholly apart from the fact that the *Maryland Drydock* decision has now been repudiated by the National Board, it is clear that the New York Act, as applied, has not burdened interstate commerce.

During the interval between the *Maryland Drydock* decision and the *Packard* decision, there was a wave of recognition strikes by foremen in other states. The foremen in appellant's New York plants, had the use of the New York Act's machinery, and did not strike. [22]

In the *Packard* case, after referring to the fact that 642,389 man-days had been lost in strikes by foremen for recognition (61 N. L. R. B. at 13), the National Board concluded (61 N. L. R. B. at 21):

22. The New York Board's decision in the *Allegheny* case had pointed out that the "fundamental" rights of employees, including foremen, to organize and to seek bargaining were not created by the Labor Relations Acts but antedated them; that to withhold from foremen the statutory machinery for obtaining recognition would be to relegate them to the use of economic strength and would result in industrial strife (No. 76, R., p. 34).

See also discussion in *Matter of Journal News*, 7 N. Y. S. L. R. B. 295, 300-306 for a more complete statement of the New York Board's approach.

> "To continue to deny to such employees as a class the bargaining rights guaranteed by the Act would be to ignore the clear economic facts and invite further industrial strife—a state of affairs which the Nation can ill afford at this time and which the Act was designed to mitigate. We are now convinced that the national interest will be better protected if the organizational activities of foremen are conducted within, rather than without, the framework of the collective bargaining statute."

Thus, the fact is—and this is admitted by the Solicitor General (p. 30n)—the *Maryland Drydock* decision "led to frequent and serious strikes, disruptive of interstate commerce and war production * * *."

The return by the National Board to the policy consistently followed by the New York Board clearly demonstrates that no burden on interstate commerce resulted from the action of the New York Board in the cases at bar. Indeed, it shows that a burden upon interstate commerce was removed by the action of the New York Board.

We respectfully submit therefore that the New York Act does not conflict with the National Act either in terms or as here applied.

We shall next show (Point III, *infra*) that nine years of administrative construction and procedure, as well as practical considerations, support the New York Board's jurisdiction.

POINT III

The long-continued administrative construction and procedure of the National Board support the New York Board's concurrent jurisdiction.

It has been shown in Points I and II that the National Act is paramount but not exclusive, that the National Act and the New York Act lawfully stand together and that the New York Act does not conflict with the National Act in terms or as here applied.

A

Administrative construction reinforces the New York Board's jurisdiction.

Over nine years ago the National Board and the New York Board adopted, and have since followed, a practical construction of the two Acts—a construction based upon the existence of concurrent jurisdiction in the New York Board, and compatible with no other theory. This administrative construction of the two Acts is consonant with the subsequent decisions of this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (p. 32, *supra*); *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (p. 33, *supra*), and the subsequent decisions of the New York Court of Appeals in *Duroga-City Radio* v. *New York State Labor Relations Board*, 281 N. Y. 13 (p. 34, *supra*), and of the Wisconsin Supreme Court in *Wisconsin Employment Relations Board* v. *Racping Leather Co.*, 228 Wisc. 473, 279 N. W. 673 (p. 15, *supra*).

In July, 1937, the two Boards reached an understanding as to the practical allocation of matters between them. That understanding was embodied in a letter, dated July 12, 1937, from Reverend John P. Boland, then Chairman of

the New York Board, to Honorable J. Warren Madden, then Chairman of the National Board (Solicitor General's Brief, pp. 103-5). The understanding, in substance, provided that certain categories of labor controversies were to be handled by the New York Board "without clearing, except as a matter of record, with the National Board's officials." Other categories of cases were to be handled by the National Board. Where doubt existed as to which Board should handle a particular matter, the Board with which the matter was first filed was to "clear" it with the other Board.

This understanding between the Boards necessarily was based upon mutual acknowledgment of the existence of jurisdiction in the New York Board, concurrent with that of the National Board, over labor controversies occurring within the State of New York and affecting commerce. Obviously, no such understanding could have been reached unless the New York Board had concurrent jurisdiction. [23]

During the nine years that have elapsed the New York Board continously has exercised its concurrent jurisdiction in many matters affecting commerce and over which the National Board could have exercised its superior jurisdiction had it desired to do so. A list of illustrative cases is attached hereto as Appendix D (pp. 92-5, *infra*). [24]

In many of these "commerce" matters the National Board expressly referred the parties to the New York

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23. See, for instance, *Matter of G. Schirmer, Inc.*, 5 N. Y. S. L. R. B. 72. The New York Board advised the National Board that the New York Board would proceed to investigate a petition filed with it unless the National Board asserted jurisdiction. The National Board replied that it did not object to the New York Board handling the matter "under the theory of our concurrent jurisdiction" (5 N. Y. S. L. R. B., at 73).

24. The appellant Allegheny stipulated that "the Court may in considering this case refer to and take cognizance of any and all decisions of the National Labor Relations Board and the State Labor Relations Board" (Record, p. 58).

In respect to the administrative interpretation placed upon a statute the Court may consider data which is not contained in the record (*U. S.* v. *Magnolia Petroleum Co.*, 110 F. 2d 212, 219, citing *Minn.* v. *U. S.*, 305 U. S. 382).

Board. A recent illustration of this is the National Board's advice to the New York Board that, although the National Board could assert jurisdiction in matters involving brokerage houses and financial institutions, it will not at this time entertain such matters and has no objection to the New York Board entertaining them (Minute of National Labor Relations Board, August 16, 1946, Solicitor General's Brief, pp. 105, 106).

For example, in *Matter of Harris-Upham Co.*, 9 N. Y. S. L. R. B. ——, not yet reported, Decision No. 3683 (August 30, 1946), 18 L. R. R. M. 1384, the National Board advised the New York Board by letter dated August 15, 1946:

> "* * * that since the above company is engaged in the brokerage business, although in our opinion the National Labor Relations Board could assert jurisdiction, cases involving brokerage houses and other financial institutions will be referred to you until such time as some labor organization attempts to set up a nation-wide unit in enterprises of said nature."

The National Board's referral of the *Harris-Upham* case to the New York Board is particularly significant because that company is chiefly and directly engaged in interstate commerce (*Polish Nat'l Alliance* v. *National Labor Relations Board*, 322 U. S. 643).

The company is a member of various exchanges throughout the country. In addition to its principal office in New York City, it maintains offices in 24 cities throughout the United States and one in Switzerland. These offices outside New York State execute their own orders on local exchanges and also execute orders for and through the New York office. All confirmations to customers are sent either from the New York City office or from the Kansas City, Missouri, office. The company also executes orders for corresponding brokers located throughout the country. Approximately 75 per cent. of the orders executed by the company originate outside New York State. Of its approxi-

mately 860 employees, about 380 work within New York State and 480 outside New York State. The union conceded not only that the company's activities affect interstate commerce, but that the company is itself engaged in interstate commerce.

Thirty-one petitions involving brokerage houses, banks, and similar enterprises are now being processed by the New York Board.

In another recent case (*Matter of E. A. Laboratories, Inc.*, Case No. SE-10675, 8 N. Y. S. L. R. B. 49, Decision No. 2953, April 5, 1945, 16 L. R. R. 233) the National Board based a complaint of refusal to bargain (National Board Case No. 2-C-6259) upon the New York Board's certification of the Foremen's Association of America (the union involved in the cases at bar) as representative of the company's foremen. The company was engaged in the manufacture of aircraft lighting assemblies, tank equipment, gun sights and generator power plants. The company also sub-contracted work for other manufacturers. Ninety-eight per cent. of the raw materials, such as steel, copper, and brass, were bought outside of New York State. About 95 per cent. of the manufactured products were shipped to points outside New York State. The union conceded that the activities of the company affected interstate commerce.

Thus, the National Board acknowledged as valid, and acted upon, the New York Board's certification in a matter directly affecting interstate commerce. [25]

In another instance, *Matter of Savage Arms Corp.*, 8 N. Y. S. L. R. B. 322, Decision No. 3052 (July 14, 1945), 17

25. Letter from National Board, June 5, 1946:

"We are about to issue a complaint against the above-named company [E. A. Laboratories, Inc.], alleging in part that in violation of the National Labor Relations Act, the company refused to bargain with the Foremen's Association of America, Chapter 104.

"That aspect of our case will be based upon your certification of that organization in your case No. SE-10675, Decision No. 2953."

The letter then requestgd a transcript of the record before the New York Board and of the decision and certification, in order that they might be incorporated in the record in the National Board proceeding.

L. R. R. 206, a union filed separate petitions with the New York Board, seeking in one to be certified as representative of foremen and assistant foremen (New York Board Case No. CE-385) and in the other, as representative of leaders and machine setters (New York Board Case No. CE-387), at the company's plant in Utica, New York. The Utica plant was engaged in the manufacture of machine guns and other weapons. In addition to its plant in Utica, the company, a Delaware corporation, had a manufacturing plant in Massachusetts. Ninety per cent. of the raw materials used in the Utica plant came from outside New York State, and over 90 per cent. of the finished product was shipped outside the State.

The same union also had a petition pending with the National Board, seeking certification as representative of the company's production employees in the same plant (National Board Case No. 3-R-961). The New York Board notified the National Board of the petitions filed with it. The National Board suggested that the New York Board refer the union to the National Board so far as representation of the leaders and machine setters was concerned (New York Board Case No. CE-387), inasmuch as such employees are usually included in the same unit with rank and file employees. The National Board further suggested, however, that the New York Board proceed to process the petition relating to the company's foremen and assistant foremen (New York Board Case No. CE-385). The New York Board advised the union to withdraw the petition relating to the leaders and machine setters and refile it with the National Board. The union did so (National Board Case No. 3-R-994). The New York Board proceeded on the petition relating to the foremen and assistant foremen.

The National Board issued its Decision and Direction of Election on July 6, 1945. The National Board included the machine setters and leaders in the unit of production employees, and excluded the foremen and assistant foremen

(62 N. L. R. B. 1156, 1159). The New York Board issued its Decision and Direction of Election on July 14, 1945, finding that the foremen and assistant foremen constituted an appropriate bargaining unit.

To insure that the outcome of one election would not affect the other, the elections were conducted by the respective Boards on the same day, by mutual arrangement, and the ballots counted and the results announced simultaneously.

The *Savage Arms* matter is especially pertinent here. It involved the New York plant of an interstate manufacturing enterprise. The National Board processed the petitions concerning the rank and file employees in the New York plant. The National Board suggested that the New York Board process the petition concerning representation of the foremen in the same plant. The two Boards, by mutual arrangement, conducted elections on the same day.

The concurrent jurisdiction of the New York Board is also demonstrated by various cases involving the Montgomery Ward Company. That company operates a wholesale and retail merchandising business and maintains nine mail order houses, approximately 650 retail stores, 200 catalogue offices and various warehouses throughout the country.

The New York Board has handled a number of cases involving the employees of Montgomery Ward and Company with the knowledge and acquiescence of the National Board. In 1939 a petition was filed with the New York Board concerning the selling, non-selling and office employees of the company's store in Queens, New York City (New York Board, Case No. SE-3838). The New York Board notified the National Board of the filing of the petition. The National Board asked that the matter be referred to it. The New York Board advised the union to withdraw its petition and file it with the National Board.

A year later a union filed a petition with the National Board concerning those same employees (National Board Case No. II-R-1958). The National Board advised the union to withdraw the petition and file it with the New York Board. The New York Board processed the petition (Case No. SE-6364, 4 N. Y. S. L. R. B. 208). After the union had been certified, a refusal to bargain charge was filed (New York Board Case No. SU-7218). The New York Board issued an order directing the company to cease refusing to bargain (5 N. Y. S. L. R. B. 441). The order was upheld by the New York courts (179 N. Y. Misc. 298, aff'd 266 N. Y. App. Div. 878).

Other *Montgomery Ward* cases filed with the New York Board involved unfair labor practices committed at the company's store in Kingston, New York (5 N. Y. S. L. R. B. 1067) controversies concerning representation of employees in the company's mail order house at Albany, New York, two warehouses in Albany and Troy, New York, and a retail store in Menands, New York (7 N. Y. S. L. R. B. 24); and alleged unfair labor practices in the company's mail order department and its store in Menands, New York (New York Board Cases No. CU-413; CU-343) and its store in Rockport, New York (New York Board Case No. WU-370).

The *Montgomery Ward* cases are of particular importance in showing the concurrent jurisdiction of the New York Board, for the National Board referred the parties to the New York Board although the National Board at all times accepted jurisdiction over cases in other states involving that same company. [26]

The concurrent jurisdiction of the New York Board has served the common objective of both Acts, namely, to promote the cause of industrial peace and stability by assur-

26. See, *e. g.*, 4 N. L. R. B. 1151 (Missouri); 9 N. L. R. B. 538 (Oregon); 17 N. L. R. B. 191 (Minnesota); 25 N. L. R. B. 318 (Illinois); 29 N. L. R. B. 1120 (Maryland).

ing to employees the right to organize and bargain collectively through representatives of their own choosing (National Act, Sec. 1; N. Y. State Act, Sec. 700; N. Y. State Constitution, Art. 1, Sec. 17). As far back as 1938 the National Board declared (Third Annual Report, p. 3):

> "In its last report the Board stated that it looked with favor on the adoption of State labor relations acts patterned after the National Labor Relations Act.
>
> . . . . . .
>
> "Last year the Board also reported that it hoped to make cooperative arrangements with the State boards to the end that administrative friction and lack of uniformity in the application of principles would not ensue. This hope has been completely fulfilled and the Board or its agents has been able to achieve satisfactory working arrangements with all of the State boards or their agents . . . ."

The administrative construction given to the National and New York Acts is of great persuasive force. The construction placed upon a statute by those charged with the duty of administering it is entitled to great weight and, particularly so, where the construction has been implemented by a course of conduct over a long period of time (*Minty* v. *Baldwin*, 289 U. S. 346, 351; *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294, 311, 315; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 681; *U. S.* v. *Jackson*, 280 U. S. 183; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740; *Brewster* v. *Gage*, 280 U. S. 327; *Maynard* v. *Elliott*, 283 U. S. 273; *Beers* v. *Hotchkiss*, 256 N. Y. 41; *Lattauer* v. *Stern*, 477 N. Y. 233).

Nine years have brought no indication of a contrary Congressional intent.

The foregoing makes it clear that the New York Board had concurrent jurisdiction over the controversies concerning representation of appellants' foremen in their New

York plants. The proceedings taken by the New York Board herein are valid and effective, since the National Board did not assume or assert jurisdiction. The National Board did not request the New York Board to refer the instant cases to it or to refrain from taking jurisdiction over them.

The appellant Bethlehem (Brief, p. 11) stresses the fact that the National Board has exercised jurisdiction over previous labor controversies involving employees at its New York plant. That is immaterial. The prior action taken by the National Board concerned *only the rank and file employees*. After elections, the National Board certified the United Steel Workers of America, C. I. O., as the exclusive bargaining representative of certain groups of rank and file employees. *The determinative fact of record, however, is that Bethlehem's foremen were not involved in those proceedings before the National Board.*

Nor did the action of the New York Board infringe upon the rank and file units previously established by the National Board. The units of rank and file employees found by the National Board and the unit of foremen found by the New York Board were and are exclusive of each other. [27]

Moreover, the Foremen's Association of America is an independent labor organization admitting only foremen to membership and having no connection with the United Steel Workers of America, which represents the rank and file employees (Allegheny Record, pp. 20-21, 26, 29).

27. *Cf.* the *Savage Arms* case (p. 57, *supra*), where the National Board conducted a rank and file election simultaneously and in cooperation with the New York Board's conduct of a foremen's election.

See also the *Harris Upham* case (p. 55, *supra*), where the National Board previously had conducted an election among some of the very same employees involved in the subsequent proceeding before the New York Board; and the *Montgomery Ward* case (p. 58, *supra*), where the National Board and the New York Board handled the same group of employees successively.

B

Practical considerations support the New York Board's jurisdiction.

The theory of concurrent jurisdiction, and the "co-operative arrangements" which the National and New York Boards have observed for the past nine years (see National Board's Third Annual Report, quoted p. 60, *supra*), have substantially contributed to the accomplishment of the National Act's objectives. Indeed, the application of the New York Act in the cases at bar actually removed an obstruction to interstate commerce (pp. 51-2, *supra*).

Denial to the New York Board of concurrent jurisdiction over disputes occurring within New York and affecting commerce, would require discontinuance of this long-standing cooperation, complicate and increase the work of both Boards and decrease their usefulness.

It would result in a tremendous increase in the number of cases filed with the National Board. This increase would overburden the National Board, first, because its case load has been greatly augmented since the removal of war-time controls and is still increasing; second, because sharp budgetary cuts in the appropriations of the National Board have resulted in the discharge of many of the employees necessary to handle the volume of labor matters; and third, because the National Board would be saddled with an ever-increasing task of determining whether alleged intra-state cases are in the interstate class and hence within the National Board's jurisdiction (*e. g.*, the *Consolidated Edison* case, 305 U. S. 197, p. 32, *supra*), or whether alleged interstate cases are in the intra-state class and hence not within the National Board's jurisdiction—all of which would complicate the National Board's work to such an extent as to make it exceedingly difficult, if not impossible,

to make a speedy determination of the real interstate commerce cases. [28]

It would introduce jurisdictional questions into *practically every matter* before the New York Board, and would invite delay, not only in proceedings before the Board, but through suits for declaratory judgment, in which employers or unions assert that interstate commerce is affected or involved and that therefore jurisdiction rests, as a matter of law, exclusively with the National Board. In such matters the work of the New York Board would be brought to a standstill until after long periods of time had elapsed and the jurisdictional questions had been passed upon by the New York Courts and possibly by this Court. Such a state of affairs obviously would block expeditious determination of labor disputes, and increase the number of strikes, lockouts and other forms of economic strife—the very evils which both the National Act and the New York Act were designed to reduce. [29]

It would result in the creation of a "no man's land" in which both Acts could be evaded with impunity. If a labor controversy occurring within New York and affecting com-

28. On August 15, 1946, the National Board began a 22 per cent. personnel reduction as a result of a $677,400 cut in its appropriation for the 1947 fiscal year. The Board estimated that present funds will permit processing only 10,800 of the 15,000 cases anticipated before July 1, 1947, thus increasing the existing backlog of 4,600 cases to over 9,000 during the coming year. It announced that its work force of 985 persons would have to be cut to 850 by October 1, 1946 and to 760 by January 1, 1947.

At the same time, as against an average monthly total of new cases for 1945-1946 of 1,020, the totals of new cases received for May, June and July, 1946 averaged over 1,400 cases monthly.

The Board, translating this into terms of workers, factories, and possible industrial strife, said that it expected that "the reduced appropriation [may] * * * affect some 1,400 plants in communities throughout the country, [with] * * * the potentialities of individual turmoil * * * greatly increased." (See Washington Daily Reporter System, Report No. 163, August 16, 1946, Bureau of National Affairs, Washington, D. C.)

29. Since its inception on July 1, 1937 through October 31, 1946 the New York Board has handled 14,618 cases involving 581,730 employees. Although it is impracticable to review all those files, it is fair to say that, in the absence of concurrent jurisdiction, the majority of those cases, under the "affecting commerce" principle, could have given rise to jurisdictional questions and consequent litigation. See, for example, cases set forth in Appendix D hereto.

merce, can be resolved only by the National Board, and if, for reasons not going to the merits of the controversy as, for example, administrative or budgetary reasons, the National Board did not exercise its jurisdiction, the employees concerned would lose their rights despite the existence of the two Acts designed to safeguard such rights. As the New York Court of Appeals said in *Davega-City Radio* v. *New York State Labor Relations Board*, 281 N. Y. 13, 24-5):

> "In so far as is possible within the framework of our Federal form of government, such a result should be avoided. To permit State enforcement of a State law consistent with a Federal law on the same subject until such time as the appropriate Federal agency asserts its own jurisdiction in no way lessens the supremacy of the national laws as required by article VI of the Constitution."

For example, in the *Harris-Upham* case (p. 55, *supra*) the company contended that even though the National Board had declined to entertain a petition, the New York Board was without jurisdiction because of the interstate nature of the company's activities. Only the principle of concurrent jurisdiction made it possible for the New York Board to act in a situation which was instinct with the very mischief which both the National Act and the New York Act seek to eliminate.

It is asserted to be the problem of "practical enforcement" which now leads the National Board to take the position urged by the Solicitor General (Brief, p. 46n). The underlying factor, apparently, is the apprehension that concurrent jurisdiction in the New York Board would permit unions to "shop around" for a favorable forum, a procedure which, the National Board asserts, it is powerless to prevent or to remedy if a conflicting policy should be adopted by a State Board (Solicitor General's Brief, p. 56).

It is respectfully submitted that the contention is speculative, unsupported by the record and otherwise without merit.

The basis for the National Board's position is that it is not a quasi-legislative agency with power of affirmative regulation, but rather a "forum" to which the parties must first come, because the National Board "acts only when petitions or charges are filed with it" (Solicitor General's Brief, p. 56). [30] It is then stated that, although the National Board may be aware that a State Board is reaching a decision which it considers erroneous, "there is nothing [the National Board] can do to remedy the situation."

That same result, of course, might follow in cases which the National Board declines to accept and refers to the New York Board. But more important, the speculative fears of the National Board are not in accordance with past experience. In the four Wisconsin cases referred to by the Solicitor General (Brief, pp. 52-3) petitions or charges actually were filed with the National Board, and that Board exercised its paramount jurisdiction. [31] In the Pennsylvania case, [32] the Federal District Court held that it had jurisdiction to entertain an action to enjoin the Pennsylvania Board from conducting an election in a state-wide unit, where the National Board had previously dismissed a petition on the ground that such a unit was not appropriate. [33]

Thus, in each of the Wisconsin and Pennsylvania cases the National Board had opportunity to, and did, exercise its paramount jurisdiction, and the courts of both those

30. If such be the case, the argument advanced by the Solicitor General (pp. 45-8) that the "field" was one which Congress intended to occupy by "affirmative regulation" necessarily falls. Congress could hardly have intended to preclude application of the state's police power to matters traditionally of local concern by creating a federal agency whose power to act depends upon the discretion of private parties.

31. *Matter of Creamery Package Mfg. Co.*, N. L. R. B. Case #XII-R-341, R-2705; Wisconsin Bd. Case III, #348-E-117; *Matter of Fox River Valley Knitting Co.*, N. L. R. B. Case #XII-C-742; Wisconsin Bd. Case 1, #432-E-149; *Matter of Wilson Hurd Mfg. Co. Inc.*, 68 N. L. R. B. 853; *Matter of Evinrude Motors*, 66 N. L. R. B. 1142.

32. *United Office & Professional Workers* v. *Smiley*, 18 L. R. R. M. 2356.

33. The injunction was dissolved on the ground of improper venue only.

states, like the New York courts, have acknowledged that such action by the National Board overrides state action. [34]

In the cases at bar, the New York Board, before proceeding, notified the National Board, but the National Board neither requested referral of the cases to it, nor requested the New York Board not to act.

Thus, in the few instances cited by the Solicitor General, the National Board either acted or was consulted before the State Board acted. Accordingly, the professed dangers of "shopping around" do not find support in past experience.

Moreover, the National Board's alleged inability to prevent a union from "shopping around" for a favorable forum, is self-imposed. It arises from the National Board's own Rules, sections 203.46, 203.47 and 203.49 (formerly Article III, secs. 1, 2 and 3) which prohibit its Regional Directors from accepting or investigating employer petitions unless it is alleged that the controversy concerning representation involves two or more unions. The National Act contains no prohibition against the filing or investigation of employer petitions. The National Board itself has said that its reluctance to investigate employer petitions is based not upon doubt as to its powers, but upon discretion (First Annual Report, pp. 25-6). Thus, it is patently within the power of the National Board, by amendment of its own rules, to eliminate shopping around, for where either the employer or the union is free to invoke the jurisdiction of the paramount national agency the other cannot effectively select a "favorable forum." [35]

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34. *Davega City Radio* v. *New York State Labor Relations Board*, 281 N. Y. 13; 22 N. E. 2d 445; *Wisc. Emp. Rel. Bd.* v. *Rueping Leather Co.*, 228 Wisc. 473; 279 N. W. 673; *In re York Tel. & Tel. Companies' Employees*, Pa. Ct. Common Pleas September 21, 1945; 17 L. R. R. 175.

35. The Rules were renumbered and amended September 11, 1946. The amendments are not here material. The pertinent sections of the Rules are printed in Appendix C hereto (pp. 87-91, *infra*).

Further, even without amendment of its rules, the National Board's paramount jurisdiction may be invoked and asserted so as to prevent "shopping around." Even though but one union was involved in each of the cases at bar, the appellants could have asked the National Board directly for permission to file a petition with it, rather than with a regional office, and the Board could have granted permission and investigated (section 203.58a; formerly Art. III, sec. 13a).

Thus, the appellants could have avoided the disability imposed upon regional offices, and the National Board itself, being under no disability, could have acted.

Or appellants could have filed a petition with the National Board's regional office and appealed to the National Board from the Regional Director's refusal to act (section 203.57b, formerly Art. III, sec. 4; sections 203.58b, 203.58c-1, formerly Art. III, secs. 13b, 13c-1).

Finally, it does not appear that the filing of a petition is a prerequisite to National Board action in a representation case. [36] Section 9c of the National Act merely says that "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy * * *." And Section 203.58 (formerly Art. III, sec. 13) of the National Board's Rules, provides that: "Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may * * * (b) upon its own motion conduct, or direct any member, Regional Director, or other agent or agency to conduct an investigation under Section 9(c) of the Act; * * *." And Section 203.73 (formerly Art. IX, sec. 1) provides that the Rules "shall be liberally construed to effectuate the purposes and policy of the Act."

36. First Annual Report of National Board, pages 25-6; Report of the Attorney General's Committee on Administrative Procedure, Monograph No. 18, "National Labor Relations Board" (1940), page 75, footnote 126.

Accordingly, it seems clear that the National Board itself could have initiated action in the cases at bar, if it had so desired.

The appellants do not assert that they ever made any attempt to invoke the National Board's jurisdiction. So far as the New York Board is aware, no attempt was made. Nor did the National Board make any attempt to initiate proceedings, despite the fact that the procedures mentioned above were available to both appellants and the National Board.

The New York Board notified the National Board that petitions concerning representation of appellants' foremen had been filed, and asked if the National Board wished to take jurisdiction (*Bethlehem* R., p. 57).

If the National Board wanted to handle the petitions, or objected to the New York Board processing them, it is reasonable to assume that the National Board would have said so; but no such statement was forthcoming. [37] Neither then, nor later while the cases were being processed by the New York Board, did the National Board ask that the cases be referred to it or say that the New York Board should not proceed, or that their letters (*Allegheny* R., p. 45; *Bethlehem* R., p. 56) constituted an assertion of jurisdiction. [38] Not until January, 1945 (Solicitor General's Brief, p. 93), after the National Board had begun hearings in the *Packard* case, did the National Board even request discussion.

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37. The cases involved the so-called "foreman issue." The appellants contended unsuccessfully before the New York Board and the New York Courts that their foremen are "employers" within the meaning of Section 701, subdivision 2, of the New York Act, and not "employees" within the meaning of Section 701, subdivision 3. (Section 2, subdivisions 2 and 3 of the National Act are identical with Section 701, subdivisions 2 and 3 of the New York Act so far as material to that issue.)

38. Compare the National Board's letter of October 9, 1946 re Rosenberg, d/b/a Edro Mfg. Co., New York Board Case No. SU-12633, SE-13363:

> "We have reviewed the circumstances set forth in your letter [letter of New York Board] and are of the opinion that the [National] Board will assert jurisdiction. Accordingly, we suggest that you notify the parties to this effect. We anticipate that we may have access to your files in the event that the matter is filed with us."

At the April, 1945 conference between representatives of the National Board and the New York Board (Solicitor General's Brief, pp. 100-3) the National Board representatives suggested that since the National Board was again entertaining foremen's petitions, future cases involving large manufacturing establishments doing interstate business, preferably should be processed by the National Board. The New York Board pointed to its obligation to contribute to industrial peace within the state and reserved its position that it was advisable for the New York Board to entertain petitions for units of supervisory employees, where it was doubtful whether the National Board would proceed with the case were it filed with the latter Board. The New York Board agreed, however, not to reach out for cases of that character and to advise the National Board of any such cases which the New York Board decided to entertain (Solicitor General's Brief, p. 102).

The National Board representatives did not ask, and up to the present time have not asked, the New York Board to refrain from proceeding further with the still pending representation proceeding involving foremen of the appellant *Bethlehem*, or with the unfair labor practice proceeding involving the appellant *Allegheny*, in which the Board directed *Allegheny* to bargain with the foremen's union previously certified (Case No. WU-404, 9 N. Y. S. L. R. B.——, not yet reported, Decision No. 3519, May 29, 1946).

C

Concurrent jurisdiction has not only "worked out well," but is consonant with established legal principles.

The National Board itself admits that the practical construction of the two Acts, adopted by the respective Boards and in effect for over nine years, has "worked out well" (Memorandum of General Counsel of National Board, Solicitor General's Brief, p. 96). As the Solicitor

General has recognized with regard to coexistent Federal and state legislation concerning price and wage controls, the existence of state legislation "might lessen a difficult Federal policing problem and thus greatly facilitate enforcement of the Congressional policy" (Solicitor General's Brief, p. 41). The National Act and the New York Act are practically identical, both in language and policy. The National Board, concededly, because of administrative and budgetary considerations, is unable to handle all the controversies over which it has jurisdiction (Solicitor General's Brief, pp. 67-8). Accordingly, as the Solicitor General states (Brief, p. 69), "it is obviously more consonant with the policy of the national statute to permit enforcement of state laws embodying the same policy than to leave the employees' rights without any statutory protection." Particularly is that true, where, as here, a contrary holding would bar the exercise of New York's police power to reduce industrial strife within the borders of the state. [39]

The Solicitor General says (Brief, p. 76):

> "We think the practical approach to the problem of concurrent jurisdiction by the New York and National Boards points the way to the proper solution of the constitutional problem."

He further states (Brief, p. 70):

> "The National Board may announce a general policy of declining jurisdiction in an entire class of cases. (See, for example, the National Board's declaration as to New York brokerage houses, pp. 75-76, *infra;* and the over-all agreement between the National and New York Boards as to which cases shall be handled by each, pp. 71-73, *infra.*) In such cases the

39. The position thus taken by the Solicitor General is inconsistent with his previous argument that the existence of discretionary powers in the Boards precludes state legislation even though its policy is identical with that of the National Act (Solicitor General's Brief, p. 51).

Compare also this "discretion" argument with the statement (Solicitor General's Brief, p. 34) that the obligations of employers are imposed by the National Act, and not by the National Board.

> National Board's announcement of general policy is itself adequate to justify the initiation of proceedings before the State Board."

Those statements, like the nine-year course of conduct on the part of the Boards, can only be grounded on the theory that the New York Board has concurrent jurisdiction in cases affecting commerce and may lawfully act until the National Board assumes or asserts its paramount jurisdiction. Certainly neither those statements nor the procedure which the Boards have followed is compatible with any theory of pre-emption. There is no basis for a proposition that the National Act is pre-emptive except "when the National Board indicates that it will decline to assume jurisdiction over the particular case or class of cases—" (Solicitor General's Brief, p. 71). *The National Act makes no distinction among cases affecting commerce.* If the National Act is pre-emptive, then that pre-emption would extend as a matter of law to any case which "affects commerce" (National Act, sec. 2, subd. 7; sec. 9, subd. c), and there would be no room for the New York Board to act, even with the consent of the National Board. Thus, the theory of concurrent jurisdiction is indispensable to the position taken by the Solicitor General.

The Solicitor General's contention, therefore, ultimately reduces to the proposition that where the National Board takes jurisdiction on a case to case basis, the New York Board is without jurisdiction to act in labor controversies affecting commerce unless and until the National Board, by declaration, confers jurisdiction upon it; in other words, that the concurrent jurisdiction of the New York Board comes into existence only at the option of the National Board (Solicitor General's Brief, p. 70).

In this, the Solicitor General departs from the practical construction long followed by the two Boards and offers

a theory without precedent in law. It is respectfully submitted that there is no basis or authority for the theory that the National Board may confer upon the New York Board an otherwise non-existent jurisdiction. [40]

On the other hand, the practical construction heretofore adopted by the Boards, based on the theory that the New York Board has jurisdiction to act until superseded by the paramount federal power, is consonant with firmly established principles. The states' police power does not arise by declaration of a federal agency. It is inherent in the states and it is operative until the federal agency assumes or asserts jurisdiction.

If the National Board desires to alter the present method of clearing cases between the two Boards, that is a matter for future discussion between them. It is not material to whether the New York Board has concurrent jurisdiction, for, as we have said, that theory affords the only basis on which the New York Board could act in cases affecting commerce, whether the National Board expresses itself before, during or after the New York Board's action.

In any event, a desire for future change is not ground for nullifying action on the part of the New York Board, taken with knowing acquiescence on the part of the National Board, and in full accordance with the theory of concurrent jurisdiction to which both Boards consistently have adhered.

40. Section 4a of the National Act empowering the National Board to "establish or utilize such regional, local, or other agencies * * *" (Solicitor General's Brief, pp. 63-4) refers to federal agencies or instrumentalities. The National Board enforces the National Act. The New York Board enforces the New York Act. Neither enforces the Act of the other. Nothing in the National Act empowers the states to enforce it.

CONCLUSION

The order of the Court below in the *Bethlehem* case, No. (55), and the judgment of the Court below in the *Allegheny* case, No. (76), should be affirmed.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

The pertinent provisions of the New York State Labor Relations Act (New York Laws of 1937, Chapter 443, as amended by the New York Laws of 1942, Chapter 518; 30 McKinney's Consolidated Laws of New York, § 700–716) are as follows:

SEC. 700. FINDINGS AND POLICY.—The economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers another greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, substantially and adversely affect the interest of employees, other employers, and the public in general. Such denial creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchasing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the disparity between production and consumption, (c) to create unemployment with its attendant dangers to the health, peace and morale of the people, and (d) to

increase public and private expenditures for relief of the needy and the unemployed.

When some employers deny the right of employees to full freedom of association and organization, and refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health.

Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between and among employers and employees, thereby advancing the interests of employers as well as employees.

In the interpretation and application of this article, and otherwise, it is hereby declared to be the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.

All the provisions of this article shall be liberally construed for the accomplishment of this purpose.

This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state.

SEC. 701. DEFINITIONS. When used in this article:

. . . . . .

2. The term "employer" includes any person acting on behalf of or in the interest of an employer,

directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

3. The term "employees" includes but is not restricted to any individual employed by a labor organization; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers.

SEC. 703. RIGHTS OF EMPLOYEES.—Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.

SEC. 704. UNFAIR LABOR PRACTICES.—It shall be an unfair labor practice for an employer:

1. To spy upon or keep under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of the rights guaranteed by section seven hundred three.

2. To prepare, maintain, distribute or circulate any blacklist of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise by such individuals of any of the rights guaranteed by section seven hundred three.

3. To dominate or interfere with the formation, existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances, or to contribute financial or other support to any such organization, by any means, including but not limited to the following: (a) by participating or assisting in, supervising, controlling or dominating (1) the initiation or creation of any such employee organization or association, agency, or plan, or (2) the meetings, management, operation, elections, formulation or amendment of constitution, rules or policies, of any such employee organization or association, agency or plan; (b) by urging the employees to join any such employee organization or association, agency or plan for the purpose of encouraging membership in the same; (c) by compensating any employee or individual for services performed in behalf of any such employee organization or association, agency or plan, or by donating free services, equipment, materials, office or meeting space or anything else of value for the use of any such employee organization or association, agency or plan; provided that, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

4. To require an employee or one seeking employment, as a condition of employment, to join any company union or to refrain from forming, or joining or assisting a labor organization of his own choosing.

5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment:

Provided that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five.

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

7. To refuse to discuss grievances with representatives of employees, subject to the provisions of section seven hundred five.

8. To discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this article.

9. To distribute or circulate any blacklist of individuals exercising any right created or confirmed by this article or of members of a labor organization, or to inform any person of the exercise by any individual of such right, or of the membership of any individual in a labor organization for the purpose of preventing individuals so blacklisted or so named from obtaining or retaining employment.

10. To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three.

SEC. 705. REPRESENTATIVES AND ELECTIONS.—1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees, directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization.

* * * * * * *

SEC. 706. PREVENTION OF UNFAIR LABOR PRACTICES. —1. The Board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

* * * * * * *

SEC. 715. APPLICATION OF ARTICLE.—The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act . . . .

. . . . . .

APPENDIX B

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial

disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * * * *

SEC. 2. When used in this Act—

* * * * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * *

SEC. 4. (a)

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The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed.

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and pub-

lished by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * * * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bar-

gaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * * * *

SEC. 14 Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

APPENDIX C

Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946.

Series 4 renumbered and amended Series 3. Series 3 was adopted on November 26, 1943 and was in effect at the time of the events which gave rise to the cases at bar.

The amendments are not material to the cases at bar. The old section numbers appear in parentheses.

SEC. 203.46 (former Art. III, sec. 1). *Petition for certification; where to file; withdrawal.*—A petition to investigate and certify under Section 9 (c) of the Act the name or names of representatives designated or selected for the purpose of collective bargaining may be filed by an employee or any person or labor organization acting on behalf of employees, or by an employer. Such petition shall be in writing, the original being signed and sworn to before any notary public, Board agent, or other person duly authorized by law to administer oaths or take acknowledgments. Three copies of the petition shall be filed. Except as provided in Section 203.58, such petitions shall be filed with the Regional Director for the Region wherein the contemplated bargaining unit exists, or, if the contemplated bargaining unit exists in two or more Regions, with the Regional Director for any of such Regions. Prior to the transfer of the case to the Board, pursuant to Section 203.53, the petition may be withdrawn only with the consent of the Board or of the Regional Director with whom such petition was filed. After such transfer, a petition may be withdrawn only with the consent of the Board. Whenever the Board or Regional Director approve the withdrawal of any petition the case shall be closed.

SEC. 203.47 (former Art. III, sec. 2). *Contents of petition.*—(*a*) Such petition, when filed by an employee or

any person or labor organization acting on behalf of employees, shall contain the following:

(1) The name of the employer.

(2) The addresses of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The number of employees in the alleged appropriate unit.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit.

(7) The nature of the alleged question concerning representation.

(8) The name, affiliation, if any, and address of the petitioner.

(9) Any other relevant facts.

(*b*) Such petition, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that a question or controversy affecting commerce has arisen concerning the representation of employees of the petitioner in that two or more persons or labor organizations have presented to the petitioner conflicting claims that each represents a majority of the employees in the unit or units claimed to be appropriate.

(4) The names, affiliation, if any, and addresses of the persons or labor organizations making such claims of representation.

(5) A statement whether the petitioner has contracts with any of the competing labor organizations, and, if so, their expiration dates.

(6) Any other relevant facts.

SEC. 203.49 (former Art. III, sec. 3). *Investigation of petition by Regional Director; Notice of Hearing; service of notice; withdrawal of notice.*—After a petition has been filed, if no agreement such as that provided in Section 203.48 is entered into and if it appears to the Regional Director that the policies of the Act will be effectuated and that (if the petition is filed by a labor organization), there is a reasonable probability that an investigation will result in a free choice by employees of a bona fide representative, he shall institute such investigation, provided, however, that the Regional Director shall not institute an investigation on a petition filed by an employer unless it appears to the Regional Director that two or more persons or labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining unit or units claimed to be appropriate. The Regional Director shall prepare and cause to be served upon the employer and upon any known persons or labor organizations purporting to act as representatives of any employees directly affected by the investigation (all of whom shall thereupon become parties to the proceeding), and upon any employee or other person or labor organization who has filed a pending motion to intervene, a Notice of Hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such Notice of Hearing. Any such Notice of Hearing may be amended or withdrawn before the hearing by the Regional Director on his own motion.

SEC. 203.57 (former Art. III, sec. 4). *Refusal to institute investigation; termination of investigation; appeals to Board from action of the Regional Director.*—(*a*) If, after a petition has been filed, it shall appear to the Regional Director that no investigation should be made, the Regional Director may decline to institute such investigation, and close the case. If, after an investigation has been instituted pursuant to Section 203.49, it shall appear to the Regional Director that further investigation should not be made, he may terminate the investigation and close the case at any time prior to issuance of an order transferring the case to the Board.

(*b*) If the Regional Director closes a case, pursuant to subsection (*a*) hereof, he shall so advise the petitioner in writing, accompanied by a simple statement of the procedural or other grounds. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the Regional Director, within ten (10) days of notification of the close of the case. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

SEC. 203.58 (former Art. III, sec. 13). *Proceedings before Board; filing petition with Board; investigation upon motion of Board; transfer of petition and proceeding from Region to Board or to another Region; consolidation of proceedings in same Region; severance; procedure before Board in cases over which it has assumed jurisdiction.*—Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may—

(*a*) permit a petition requesting an investigation and certification to be filed with it, and may upon the filing of such petition proceed to conduct an investigation under Section 9 (c) of the Act, or direct a Regional Director, or other agent or agency to conduct such an investigation; or

(*b*) upon its own motion conduct, or direct any member, Regional Director, or other agent or agency to conduct an investigation under Section 9 (c) of the Act; or

(*c*) at any time after a petition has been filed with a Regional Director pursuant to Section 203.46, order that such petition and any proceeding which may have been instituted in respect thereto—

(1) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(2) be consolidated, for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same Region; or

(3) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in such other Region, or for any other purpose; or

(4) be severed from any other proceeding with which it may have been consolidated.

The provisions of this Subpart shall insofar as applicable, apply to proceedings conducted pursuant to subsections (*a*), (*b*), and (*c*) (1) of this Section, and the powers granted to the Regional Director in such provisions shall for the purpose of this Section be reserved to and exercised by the Board, or by the Regional Director, or other agent or agency, directed to conduct the investigation. After the transfer of any petition and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to subsection (*c*) (3) of this Section, the provisions of this Subpart shall apply to such proceedings as if the petition had originally been filed in the Region to which the transfer is made.

APPENDIX D

List of illustrative cases affecting commerce, handled by New York Board.

Montgomery Ward & Co., 4 SLRB 208; 5 SLRB 441; 5 SLRB 1067; 7 SLRB 24, 25. Operates 9 mail order houses and 650 retail stores throughout United States;

Harris-Upham & Co., 9 SLRB, Case No. SE 13052, Dec. No. 3683, pg. 55, *supra*. Engages in stock brokerage business on national scale;

Metropolitan Life Ins. Co., 1 SLRB 326, 327-9; 479, 481-3. Sells life, accident and health insurance throughout U. S. and Canada;

John Hancock Mutual Life Ins. Co., 3 SLRB 98, 99; 654, 655. Sells life insurance on national scale;

Prudential Insurance Co. of America, 4 SLRB 788, 790; 9 SLRB ——, Dec. No. 3761. Sells life insurance on a national scale;

G. Schirmer, Inc., 5 SLRB 72, 73, Publishes music;

Mechanics Lumber Co., Inc., 6 SLRB 711, 712. Purchases and sells lumber;

Goldsmith & Perlman, 7 SLRB 242, 243. Manufactures ladies' hats;

R. K. O. Service Corp., et al., 7 SLRB 175, 177. Owns and controls corporations engaged in production, distribution and exhibition of motion pictures throughout U. S. and Canada. Representation proceeding concerned managers in 36 New York City motion picture theatres;

Savage Arms Corporation, 8 SLRB 322, Case No. CE-385; Dec. No. 3052, 62 NLRB 1156, Nat'l Bd. Case No. 3-R-994, 3-R-961. Manufactures war equipment, pg. 56, *supra*;

Journal-News Corp., 7 SLRB 295, 296. Publishes daily newspaper and weekly publication;

American Emblem Co., Inc., 8 SLRB 1, Case No. CE-368; Dec. No. 2923. Manufactures war equipment;

United Cigar-Whelan Stores, 9 SLRB —, Case No. SE-12059; Dec. No. 3552. Operates chain of retail cigar and drug stores on national scale;

E. A. Laboratories, Inc., 8 SLRB 49, Case No. SE-10675; Dec. No. 2953, Nat'l Bd. Case No. 2-C-6259, pg. 56, *supra;*

W. H. H. Chamberlin, Inc., 9 SLRB —, Case No. CE-446; Dec. No. 3641. Printing business;

Micamold Radio Corp., 8 SLRB 561, Case No. SE-11191; Dec. No. 3222. Manufactured war equipment;

Independent Oil Burner Corp., Case No. SE-13364. Assembly and installation of oil burners;

Emily & Herman Finder d/b/a Art Craft Character Doll Co., Case No. SE-13222. Manufactures dolls;

F. W. Woolworth & Co., Case Nos. SU-13293; SU-13294. Operates chain stores on national scale;

Sinram Bros. Inc., Case Nos. SU-12235; SE-9661. Coal and oil dealers;

Arthur Rosenberg, trading as Edro Mfg. Co. & Edward Silverstein, Case Nos. SU-12633; SE-13363. Manufactures costume and novelty jewelry;

Big Bear Food Stores, Inc., Case No. SE-11453; Dec. No. 3281. Operates 3 super-markets in New York City. A wholly owned subsidiary of Food Fair Stores, Inc., which operates 90 super-markets in Eastern Atlantic States;

Safeway Stores, Case Nos. SE-13597; SE-13605. Operates 2500 retail food stores in 26 states; 152 stores in N. Y. State;

Monroe Calculating Machine Co., Case No. SU-13598, Nat'l Bd. No. 2-C-6514. Sales, service & rental of calculating machines; subsidiary of manufacturer;

U. S. Hoffman Machine Corp., Case No. SE-13534. Manufactures & installs cleaning and laundry equipment;

Blue Ribbon Novelty Corp., Case No. SE-13583. Manufactures costume jewelry;

Fine Arts Glass Co., Case No. SU-12691. Contracts with glass manufacturers to decorate glass products;

Hearns Department Stores, Inc., 1 SLRB 318, Department stores;

James McCreery & Co., 1 SLRB 725, Department store;

Bloomingdale Bros., Inc., 1 SLRB 895, Department store;

Frederick Loeser & Co., Inc., 1 SLRB 1048, Department store;

Neile F. Towner (United Traction Co.), 1 SLRB 412, Transportation;

Iroquois Gas Corp., 1 SLRB 169. Production and distribution of gas;

Gas Consumers Association, 1 SLRB 492, California corp. with branch and business offices in N. Y. City. Installs gas regulators, services gas equipment;

Williamsburgh Power Plant Corp., 1 SLRB 653, Production of power for transportation;

International Railway Co., 2 SLRB 250, Transportation;

Lord & Taylor, 2 SLRB 191, Department store;

Arnold Constable & Co., Inc., 2 SLRB 698, Department store;

Gimbel Bros., Inc., 2 SLRB 829, Department store;

Triboro Coach Corporation, 2 SLRB 739, Transportation;

Stern Bros., 2 SLRB 351, Department store;

United Traction Co., 3 SLRB 253, Transportation;

Triangle Bus Corp., 3 SLRB 285, Transportation;

Long Beach Bus Co., Inc., 3 SLRB 455, Transportation;

Jamaica Buses, Inc., 3 SLRB 513, Transportation;
Bee Line, Inc., 3 SLRB 900, Transportation;
Stern Bros., 3 SLRB 607, Department store;
Terminal System, Inc., 3 SLRB 322, Transportation;
Trustee of United Traction Co., et al., 3 SLRB 253, Transportation;
B. Gertz, Inc., 4 SLRB 931, Department store;
Lord & Taylor, 4 SLRB 270, Department store;
Queens Borough Gas & Electric Co., 5 SLRB 931. Production, transportation and distribution of gas and electricity;
Bee Line, Inc., 6 SLRB 686, Transportation;
Lockport Bus Lines, Inc., 6 SLRB 899, Transportation;
Long Island Lighting Co., 7 SLRB 37, Manufacture and distribution of gas and electricity.